Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-5394

JERRY LANE JUREK,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-5394

JERRY LANE JUREK,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas affirming petitioner's conviction of murder and sentence of death by electrocution is reported at 522 S.W.2d 934 (Tex. Cr. App. 1975). The judgment of the Twenty-Fourth District Court in and for DeWitt County, Texas, finding petitioner guilty and sentencing him to die is unreported.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. § 1257(3) (1970), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

Rehearing of the issues decided by the April 16, 1975, opinion and order of the Texas Court of Criminal Appeals was denied on May 7, 1975. The time within which a petition for writ of certiorari might be filed was extended to September 5, 1975, by order of Mr. Justice Powell. The petition for certiorari was filed on September 5, 1975, and granted on January 22, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of Texas law:

Texas Penal Code[1], Article 1256. Murder

> "Whoever shall voluntarily kill any person within this state shall be guilty of murder. Murder shall

[1] These provisions of the Texas Penal Code, applicable on the date of the offense for which petitioner was convicted, are published in an Appendix to the Current Penal Code, Vernon's Texas Penal Code Ann. Vol. IV, Laws Repealed by the Penal Code, 1973, effective January 1, 1974 (1974).

The law regarding *capital* murder is virtually unchanged by the new penal code. *See* note 2 *infra*. Murder itself is redefined as follows:

(continued)

> be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing."

Texas Penal Code[2], Article 1257.

> "(a) Except as provided in Subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for any term of years not less than two.
>
> (b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:
>
> (1) the person murdered a peace officer or fireman who was acting in the lawful discharge of

(footnote continued from preceding page)

> "§ 19.02 Murder
>
> (a) A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
>
> (3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."

Vernon's Tex. Penal Code Ann. § 19.02(a) (1974). The punishment for murder may be set at imprisonment "for life or . . . any term of not more than 99 years nor less than 5 years," Vernon's Tex. Penal Code, Ann. § 12.32 (1974), unless there is a finding of one of the five circumstances which make the crime capital murder, Vernon's Tex. Penal Code, Ann. § 19.03 (1974), in which case the punishment is death or imprisonment for life, Vernon's Tex. Penal Code, Ann. § 12.31 (1974).

[2] "Article 1257 was superseded by Section 19.03 of the new Texas Penal Code, Acts 1973, 63rd Leg., Ch. 399, eff. January 1, 1974. Section 19.03 of the new Penal Code is substantially similar to Article 1257 of the old code." *Jurek v. State, supra*, 522 S.W.2d 934, 936-937 n.1 (Tex. Cr. App. 1975).

an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article, or of any other lesser included offense.

(d) If one of the circumstances or conditions enumerated in Subsection (b) of this Article is charged in an indictment, the prospective jurors shall be informed that a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged. No person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Texas Penal Code, Article 1257(a).

"In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances

surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed 5 years the defendant shall have the benefit of the suspended sentence act."

Texas Penal Code, Article 1257(b).

"In all cases tried under the provisions of this Act, it shall be the duty of the Court to define 'malice aforethought' and [it] shall apply that term by appropriate charge to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than 5 years, provided, however, that no offense committed prior to the taking effect of Chap. 274, etc., shall be affected hereby."

Texas Penal Code, Article 1257(c)

"In all cases tried under the provisions of this Act it shall be the duty of the Court, where the facts present the issue of murder without malice, to instruct the jury that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, and

in appropriate terms in the charge to apply the law to the facts as developed from the evidence."[3]

Texas Penal Code, Article 1177. Kidnapping

"When any person is falsely imprisoned for the purpose of being removed from the State, or if a minor under the age of seventeen years for the purpose of being concealed or taken from the lawful possession of a parent or guardian, such false imprisonment is kidnapping. If the person kidnapped to [sic] be under fifteen years of age, it is not necessary that there should be want of consent nor that there should be force in order to constitute kidnapping, and in such a case, consent of such a minor shall be no defense. One guilty of kidnapping shall be confined in the State Penitentiary not less than Five or more than Twenty-Five

[3]A murder committed under the immediate influence of sudden passion arising from an adequate cause is termed voluntary manslaughter under the current penal code:

"(a) A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

(b) 'Sudden passion' means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(c) 'Adequate cause' means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(d) An offense under this section is a felony of the second degree."

Vernon's Texas Penal Code Ann. §19.04 (1974). It is punishable by imprisonment for not less than two or more than twenty years. Vernon's Texas Penal Code Ann. §12.33 (1974).

years, or by fine not exceeding two thousand dollars."

Texas Penal Code, Article 1183. Rape

"Rape is the carnal knowledge of a woman without her consent obtained by force, threats or fraud; or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without consent and with or without the use of force, threats, or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of eighteen years other than the wife of the person with or without her consent and with or without the use of force, threats or fraud; provided that if she is fifteen years of age or over the defendant may show in consent cases she was not of previous chaste character as a defense."

Texas Penal Code, Article 1190. Attempt to Rape

"If it appear on trial of an indictment for rape that the offense though not committed, was attempted by the use of force, threats or fraud, but not such as to bring it within the definition of assault with intent to commit rape, the jury may find the defendant guilty of an attempt to rape and assess the punishment of confinement in the penitentiary for any term of years not less than two."

Vernon's Texas Code of Criminal Procedure Ann. Article 37.071 (1974).[4]

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a

[4]As amended, Tex. Act 1973, 63rd Leg., p. 1125, Ch. 426, Art. 3, Sec. 1, eff. June 14, 1973.

separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

(d) The court shall charge the jury that:
(1) it may not answer any issue 'yes' unless it agrees unanimously; and

(2) it may not answer any issue 'no' unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this Article, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.
(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals."

Vernon's Texas Code of Criminal Procedure Ann., Article 43.14. (1966)

"Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than thirty days from the day of sentence, as the court may adjudge, by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of such a convict until he is dead."

QUESTION PRESENTED

Does the imposition and carrying out of the sentence of death for the crime of murder under the law of Texas violate the Eighth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

i. Proceedings Below

Following a jury trial in the Twenty-Fourth District Court in and for DeWitt County, Texas, petitioner Jerry Lane Jurek was sentenced to death for the capital murder of Wendy Adams.[5] (D.R. 72.) Miss Adams, the ten-year-old daughter of a local police officer (T. 1562), was found dead in the Guadalupe River on the morning of August 18, 1973 (T. 1639, 1644).

Trial of the twenty-five-year-old petitioner (Ex. p. 14) began on January 28, 1974. (T. 181.) On February 1, the jury was charged that it could find him guilty of capital murder, guilty of non-capital murder with malice, guilty of non-capital murder without malice, or not guilty. (D.R. 59-66.) After deliberating for one hour (T. 1910), it found petitioner "guilty of capital murder while in the course of committing or attempting to commit kidnapping and/or forcible rape." (T. 1867).

On February 2, the punishment phase of petitioner's trial was conducted. (T. 1871.) The jury, informed of the consequences of its possible verdicts,[6] was asked to respond affirmatively or negatively to the two questions whether "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the

[5] The Record before the Texas Court of Criminal Appeals consisted of a Transcript of Proceedings, cited herein as "T."; an indexed collection of exhibits, cited herein as "Ex."; and a documentary Record of Appeal, cited herein as "D.R.".

[6] The same jury sat at the guilt and punishment phases. Prior to trial of the guilt phase, twelve veniremen had been excused for cause upon *voir dire* examination on the ground of their scruples against the death penalty. (T.377-79, 448-49, 604-7, 680, 700, 805, 809, 875, 988, 992, 1040-41, 1104-6.)

deceased or another would result," and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (D.R.68-70). It took an hour and five minutes to answer both questions affirmatively (D.R.75), and petitioner was sentenced to death the following day (D.R.72).

On April 16, 1975, the Texas Court of Criminal Appeals affirmed this death sentence by a three-to-two vote, with Judges Odom and Roberts dissenting on the ground that the statutory provision predicating capital punishment upon a jury's judgment "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"[7] was unconstitutionally vague. *Jurek v. State*, 522 S.W. 2d 934 (Tex. Cr. App. 1975).

ii. Evidence at the guilt phase

The most detailed and damaging evidence concerning the manner of Wendy Adams' death consisted of two confessions by the petitioner. These were represented to the jury at the guilt phase of the trial and were apparently credited by the jury despite petitioner's contentions that they were inadmissible and unreliable retardation precluded a finding of voluntary and understanding waiver of his constitutional rights during police interrogation prior to the appointment of counsel.[8]

[7] Vernon's Tex. Code Crim. Pro., Art. 37.071(b)(2), set out at page 8 *supra.*

[8] Petitioner was picked up at his home shortly after 1:00 on the morning of August 17, 1973, by officers Adams and Boldt. (T. 111, 1757.) He was "logged into jail" at about 2:30 a.m. (T. 1757.) At the jail, he was given *Miranda* warnings by Officer Adams (T. 1338, 1763), questioned by Officer Adams for about thirty-five minutes (T. 1758), questioned by Officer Boldt for about ten minutes (T. 1758), and questioned by the local chief of

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In the first statement, petitioner said that he had known Wendy Adams for "about a month and a half"; that, on the afternoon of August 16, he had been riding

(footnote continued from preceding page)
police (T. 1668). He was then placed "in a cell by himself." (T. 1766.)

Petitioner was further interviewed that same morning at approximately 7:00 (T. 111-113) and 9:00 (T. 1299). At approximately 12:40 p.m. he was taken to Austin, Texas (T. 1315), where he was questioned by personnel of the Department of Public Safety (T. 1761), who were to administer a polygraph test (T. 113). Questioning in Austin led police officers to search for the body of Wendy Adams, without success, in at least two areas. (T. 1628-29.) It then led them to a log and two pipes upstream from Hell's Gate Bridge. (T. 1771-72.) The body was found "a fairly good distance" downstream from Hell's Gate Bridge on the following morning. (T. 1644.)

Petitioner was returned to Cuero between 9:30 and 10:00 p.m. on August 17 (A. 1761), and was taken before a magistrate at 10:15 p.m. (T. 1316). After being advised "that he was accused of the crime of murder with malice" (Ex. p. 3) and being given *Miranda* warnings (*id.*), he was further interviewed (T. 1318). The first statement was taken at 1:15 on the morning of August 18. (Ex. p. 1.) Petitioner was then taken, at his own request, to the Victoria County Jail. (T. 1324.) He was returned to the office of the prosecuting attorney at approximately 2:00 p.m. on the afternoon of August 18 for further questioning. The second statement was signed at approximately 7:00 that evening. (T. 53, 1412.) Counsel was appointed on August 22, 1973. (D.R. p. 3.)

Dr. W. C. McKinney, a psychiatrist who had examined petitioner at the request of the State, expressed a belief that petitioner did have "adequate intellectual capacity to read and understand" the two statements (T. 1678), although Dr. McKinney thought it possible that his poor insight and judgment and limited functional level of intelligence would "cause . . . [petitioner] to be able to be swayed and persuaded into . . . signing a confession against his interests" (T. 1700). Dr. McKinney's written report, which was entered as an exhibit, stated: "A general estimate of his I.Q. level was 75 to 80 or in the general borderline mental retardation range." (Ex. p. 9.)

Dr. Kenneth L. Owens, a clinical psychologist, testified that petitioner had a verbal I.Q. of 66, which falls in the mildly retarded range. (T. 1710.) His Performance I.Q. was 99, which falls in the Average range, and his overall I.Q. was 80. (Ex. p. 12.) Dr. Owens thought that petitioner might have trouble reading the statements

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"around" in a pick-up truck with two friends, Richard Broz and Ricky Phillips, drinking beer and looking unsuccessfully for a Shirley Kay Range; and that petitioner subsequently dropped his friends off at Laake's pool hall and drove to the local park. (Ex. p. 1.) The statement continues:

> "I seen Wendy Adams at the swimming pool and asked her if she wanted to go riding around and she said 'Yea'; she crawled in the back of the pick-up truck and I drove out to Hell's Gate Bridge. From the park I drove past the skating rink, turned right at the high school and came down the hill by the cemetery and went to the Yoakum Highway on what I think was Reuss Blvd. As I came on the Yoakum Highway, a big truck almost hit me; from there I drove out past where the old drive-in picture show used to be and turned off on a small road to the left and from there on out to Hell's Gate Bridge; I turned off the pavement to the right and drove down close to the river. We sat on the side of the truck and talked.
>
> Wendy was still dressed in her bathing suit that she'd had on when we left the park. Wendy told me that I shouldn't be drinking, and that I was just like my

(footnote continued from preceding page)
but would understand them if they were read to him, and that under stress petitioner would tend to "go where less pressure is" rather than to exercise judgment. (T. 1713.) The written report of Dr. Owens, also entered as an exhibit, said that "Mr. Jurek obtained a Wechsler-Bellevue I.Q. of 80, placing him in the lower limits of the Dull-Normal span of intelligence" and that "the obtained overall I.Q. figure of 80 . . . [was] felt to be representative of Mr. Jurek's current intellectual functioning." (Ex. p. 12.)

Petitioner had left school in the seventh grade (T. 1726), after having failed several grades (T. 1725).

The trial court determined that the statements were admissible (T. 165), and charged the jury that it could not consider them unless it also found them voluntary upon the evidence submitted for its consideration (T. 164).

brother who drinks a lot; and she also told me that my nieces didn't have a good father because he didn't come to see them much. I got mad at her and jerked her off the truck and grabbed Wendy around her throat and choked her to death; she tried to talk to me to get me to stop but I wouldn't listen; she was crying when I was choking her; several times while I was choking her she tried to tell me to stop but I was mad and just wouldn't listen to her. Finally she collapsed and fell to the ground as I'd been choking while we had both been standing. After she fell to the ground, I then picked her up and throwed her into the river. After I throwed Wendy in the river, she went down and then I saw her come back up for a moment and then she went back down under the water and I didn't see her come up again. The place where I threw Wendy into the river was up-river from the bridge and about as far up-river from the bridge as it is from the Court House to the jail house; also I remember that there was a fence fairly close to where I threw her in the river. When I started to choke her, she kicked at me to try to stop me and she kept hollering at me to please stop, but I just kept on choking her till she couldn't fight back and then collapsed and fell to the ground. It was kinda hard to keep on choking her when she pleaded with me to stop, but I just kept on choking her till she fell to the ground; and her face had turned dark blue from my choking her."

(Ex. p. 1.) According to the statement, petitioner then drove back to town, picked up Ricky Phillips at the pool hall, and picked up Richard Broz at his home. (*Id.*) The three "rode around" until approximately 9:15 p.m. (*Id.*)

The second statement gave a partly different account:

"On August 18, 1973, I gave Robert Post a statement concerning the death of Wendy Adams who I choked and threw into the river. In the statement that I gave him I did not tell the truth about the conversation I had with Wendy at the river and about the prior discussion about trying to find some girls to pick up and I now herein wish to correct that statement.

Earlier on Thursday, August 16, 1973, when Richard and Ricky and myself were riding around drinking beer we talked about getting some pussy. I talked about Shirley Kay Range and how I wanted to get with her and get some pussy. Ricky mentioned Kathy Prause, who is a lifeguard, and said he wanted to get with her. When I am with the guys I talk about beer and pussy.

When I took Wendy down to the river we were standing beside the truck outside on the driver's side. I asked her if she had ever had sex before and she said yes. I asked her if she wanted to have sex with me but she said no and started screaming and yelled 'help' and 'please don't kill me'. So I started choking her. I put both hands on her throat and choked her. I reached forward and dug my thumbs into her throat beside her adam's apple. I was picking up on her and she was kicking and scratching and trying to holler. My thumbs got tired and I had to move them at times. I had her against the truck holding her up. I choked her quite a while and she fell to the ground and I let go.

I let her lay on the ground a short time and then picked her up and carried her toward the river. I layed her on the log and crawled under the log and then picked her up and threw her in the river. There were two little pipes sticking out of the water when I threw her in. She went down and then came up once a long ways down the river and then went down again. She came up a second time a short ways later and was floating face up.

When I told Mr. Post in my earlier statement that Wendy and I talked about my relatives at the river I

was not telling the truth and I want to clear this up. After I threw her in the river I drove into town and got another six pack at Miss Kitty's, then picked up Ricky at Laake's pool hall, he was standing in front. I told him all I done was to get some beer and then we picked up Richard.

Everything else I have told Mr. Post in my prior statement is true and correct and I do not wish to change it."

(Ex. p. 2.)

Apart from such inferences as might have been drawn from petitioner's admission in his second confession that he had asked Wendy Adams "if she wanted to have sex with [him]," the only evidence presented by the prosecution in support of its theory of attempted "forcible rape"[9] was the testimony of one of petitioner's companions of August 16, 1973, fifteen-year-old Richard Broz (T. 1463). While Broz was riding around with petitioner and Ricky Phillips[10] in the park that afternoon, petitioner had expressed a desire to have sexual intercourse with some girls that Phillips called "too

[9] Although Article 1257(b)(2), p. 4 *supra*, provides that intentional murder during the commission or attempted commission of "forcible rape" is capital murder, there is no distinct crime in Texas termed "forcible rape." Texas Penal Code, Art. 1183, p. 7 *supra*, defines the crime of rape and provides that it may be accomplished by means of "force, threats or fraud" or, if the victim is either "so mentally diseased at the time as to have no will to oppose the act of carnal knowledge" or "under the age of eighteen years," without the use of force. The jury was charged that

> " 'Rape by Force' is the ravishing of a female by having carnal knowledge of her without her consent and against her will by means of force. The force must have been such as might reasonably be sufficient to overcome any resistance, taking into consideration the relative strength of the parties and other circumstances of the case." (D.R. p. 61.)

[10] Ricky Phillips was not called as a witness at trial.

young"; and later petitioner dropped off Broz and Phillips and said that he was going back to the park to get some girls and have sexual intercourse.[11] Since the kidnapping of a ten-year-old child under Texas law may be established without any showing of force or the absence of the child's consent,[12] the elements of that offense were made out by the testimony of Wendy Adams' father that she was in his "custody and control" on August 16, 1973 (T. 1562); that he had given her permission to go to a 4H Club field day with the understanding that she was subsequently to be picked up by her grandmother (T. 1564);[13] and that he had not given petitioner permission to take her from the park (T.

[11] Broz testified that he and Ricky Phillips had been riding with petitioner on the afternoon of the crime, and that they had driven to the park (T. 1468) looking at girls (T. 1469). Broz testified that petitioner dropped him and Ricky Phillips off at the pool hall at "[a]bout 6:30." (T. 1472.) Broz then went home. (T. 1473.) He next saw petitioner at approximately 7:00 p.m. with Ricky Phillips (T. 1474), whom petitioner had picked up near the pool hall (T. 1474-75). The three drove toward the river, and petitioner stopped on Hell's Gate Bridge and wondered aloud if the banks were muddy. (T. 1476.)

[12] False imprisonment of a child under fifteen with the "purpose" to conceal or take the child from the lawful possession of its parents is kidnapping, regardless of the child's consent and the absence of force. Texas Penal Code, Art. 1177, p. 6, *supra*. Petitioner's jury was charged:

> "When any person is falsely imprisoned, if a minor under the age of seventeen years for the purpose of being concealed or taken from the lawful possession of a parent, or guardian, such false imprisonment is kidnapping."

(D.R. 61.)

[13] Wendy Adams' grandmother testified that she took the girl to the swimming pool at about 5:30 p.m. (T. 1568) and arranged to pick her up at 7:15 on the evening of August 16; but that Wendy Adams was not there at the appointed time, and her clothing was found in the dressing room (T. 1569-70).

1564). The circumstances under which the girl entered petitioner's truck are not clear;[14] there was testimony from which the jury might have found that, at least after she was in the back of the truck, she became frightened and tried to leave or call for help;[15] but this testimony is

[14] Mrs. Clinton Wright, the wife of the local chief of police and an employee at the swimming pool (T. 1591), had known Wendy Adams (T. 1591) and testified that shortly after 6:15 (T. 1596) on the afternoon in question, the girl asked if she could leave the pool and go to the picnic area where she had friends (T. 1592). Mrs. Wright thought that Wendy Adams had commented that she liked the mother and children but remarked that the father drank. (T. 1593.) Mrs. Wright saw her stop on her way back to the pool (T. 1594) to talk to someone in a pick-up truck (T. 1594). The witness was then distracted by her work and did not see Wendy Adams or the truck in the park again. (T. 1596.) That night, she went with investigators to petitioner's residence, where she "recognized" the truck as the one at which Wendy Adams had stopped. (T. 1598.)

Mrs. Mary Buckner testified that she saw a girl whom she knew "by sight" and later learned was Wendy Adams (T. 1612) near the swimming pool on August 16 (T. 1605). She saw a blue truck with a "reddish" fender (T. 1607), the driver of which she was unable to identify (T. 1611), drive by once (T. 1607-08), return and stop near the girl (T. 1613). She then saw the girl walk toward the pool and saw the driver pull up beside her and talk to her. (T. 1613.) The witness looked away, and when she turned back the truck was driving off with the girl in the back. (T. 1614.) This took place between 5:00 and 5:45 p.m. (T. 1615.)

Donna Drehr, age 14 (T. 1584), testified that she had known Wendy Adams (*ibid.*) and had seen her in the vicinity of the pool talking with petitioner during two occasions on August 16 (T. 1584-85).

[15] Mr. George Villa testified that at 5:30 p.m. on August 16 he saw an old blue and beige truck, "doing about 50" (T. 1578), run a stop sign and nearly run into a "big truck" (T. 1577). He saw a girl in the back of the cab (*ibid.*) whom he subsequently recognized as Wendy Adams after seeing her picture in the paper (T. 1579); she yelled something which he later "figured out" was "help me please"; but he was unable to follow the truck because his path was blocked. (T. 1579-80.) He was unable to identify the driver of the truck. (T. 1578.)

Mrs. Patricia McMahan testified that some time after 5:00 p.m. (T. 1547) she saw a blue pick-up truck, traveling at a high rate of

(continued)

susceptible of alternative interpretations,[16] and the verdict below does not indicate what view the jury took of

(footnote continued from preceding page)

speed, with a child in the back "holding on and hollering" (T. 1549). She stated that the pick-up truck was almost hit by a "big truck" before it went out of her sight. (T. 1548.) She saw only the driver in the cab of the truck, and did not identify him or confirm that there were no passengers other than the girl. (T. 1560.)

Roxanna Riddle, age 12 (T. 1512), testified that she, Brenda Scott and Robin Burmeister had been riding bicycles on August 16 when they saw three boys in an old blue and white pick-up truck who tried to "run over" them. (T. 1484.) She ran toward the swimming pool and the other two girls ran behind a baseball field. (T. 1485.) When asked if petitioner was one of the three boys, the witness replied, "I think he was. He was the driver." (T. 1485.) She later joined the other two girls in the baseball field, from which she saw the truck drive by thirty minutes later (T. 1486) with a screaming blond girl in the back who was wearing a flowered bikini (T. 1487). According to Roxanna Riddle's testimony, the three girls were "hiding in a dugout" (T. 1491) and saw the truck through the cracks in a fence which was some distance away (T. 1492).

Brenda Scott, age 11 (T. 1495), and Robin Burmeister, age 12 (T. 1512), gave substantially similar testimony. Brenda Scott testified that she saw the girl in the back of the truck "just a few minutes after 4:00" (T. 1503), and Robin Burmeister testified that it was "around 5:30 or 6:00" (T. 1515). Brenda Scott indicated that when she saw the girl in the back of the truck she was looking directly through a knothole in the fence surrounding the ballpark (T. 1504), and Robin Burmeister testified that they were outside the ballpark (T. 1522). Robin Burmeister was "positive" that she had seen three boys in the truck on each of the two occasions (T. 1523), but Brenda Scott and Roxanna Riddle saw only one person in the cab of the truck on the second occasion (T. 1493, 1500). Although each of the three girls knew Wendy Adams (T. 1491, 1496, 1517), none of them recognized her as the person in the back of the truck (T. 1491, 1501, 1517). Neither Roxanna Riddle nor Brenda Scott was able to say who was driving the truck at that time. (T. 1497, 1517.)

[16] Testimony that the truck was traveling "at a terrific rate of speed" (T. 1558; *see also* T. 1548), that it ran a stop sign (T. 1577), that it was "almost hit" by a "big truck" (T. 1548), and that it traveled for a time in "the oncoming traffic lane" (T. 1580) might have suggested that the reason for Wendy Adams' screaming was fear of an accident rather than fear of accompanying petitioner.

it.[17] The pathologist who examined Wendy Adams' body after its recovery from the river testified that he found bruises, abrasions, and scratches over the larynx and on an area approximately two inches to the left and right of the "Adam's apple" region. (T. 1529.) He found evidence of bleeding in the inner ear and an increased amount of fluid in the lungs which indicated that death was due to drowning. (T. 1529-30.) He found no evidence that the victim had ever had sexual relations. (T. 1536.) There were no bruises or abrasions anywhere around the genital area. (T. 1538.) Wendy Adams' bathing suit was intact at the time of the autopsy. (*Ibid.*) The pathologist estimated the time of death as 8:00 p.m. (T. 1539), and stated that the body could have been in the water for "only a matter of minutes" before death occurred (T. 1541).

iii. Evidence at the punishment phase

The prosecution presented four witnesses at the penalty trial: Mr. Bobby McMahan, a local deputy sheriff; Mr. Lasaro Campos, a local resident; Mr. Crockett Squyres, a service station employee; and Mr. Glenn Boldt, a local police officer. Each was asked if he knew petitioner's "general reputation" in the community as a peaceable and law-abiding citizen; and each responded simply that petitioner's reputation was "bad." (T. 1873, 1876, 1879, 1888.) Mr. McMahan stated that his opinion was based solely upon arrests of petitioner, and that he

[17] This is so because, as indicated in note 12 and accompanying text *supra*, the jury was permitted to find kidnapping or attempted kidnapping whether or not Wendy Adams initially accompanied and subsequently remained with petitioner voluntarily.

knew of no case in which petitioner had been convicted of a crime. (T. 1874.) Mr. Campos stated that his testimony was based upon "hearsay." (T. 1877.) Mr. Squyres stated that his testimony was based upon hearsay (T. 1885) and petitioner's truancy during his school years (T. 1880). Mr. Boldt testified that his opinion was based upon the crime at issue and upon hearsay.

Petitioner presented the testimony of his father regarding petitioner's work history, church attendance and family life. (T. 1892-85, 1885-86, 1886-87.) On cross-examination, the prosecuting attorney asked the witness if he had heard that his son had been charged in 1969 with assault with intent to rape a ten-year-old child, charged in the State of Louisiana with the attempted rape of a seven-year-old girl, and charged with the crime of forgery. (T. 1887-99.) The witness testified that he had not heard of the first two charges and that the third offense had been committed by petitioner's wife. (T. 1898-99.)

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

On January 10, 1974, petitioner moved to dismiss the indictment on the ground that the death penalty was unconstitutional. (D.R. 27-28.) The motion was denied in open court on January 25, 1974. (T. 174-75.) Petitioner filed an amended motion for a new trial on February 25, 1974, which included, among other grounds, the unconstitutionality of the death penalty. (D.R. 78.) This motion was also denied in open court. (T. 1928-29.)

On appeal to the Texas Court of Criminal Appeals, petitioner contended "that the assessment of the death

penalty under Article 1257 . . . and Article 37.071 . . . is cruel and unusual punishment under the holding of the Supreme Court of the United States in *Furman v. Georgia*, 408 U.S. 238 . . . (1972), and the Eighth and Fourteenth Amendments of the United States Constitution." *Jurek v. State, supra*, 522 S.W.2d 934 at 937.

The Texas Court of Criminal Appeals explicitly rejected this contention and sustained the constitutionality of petitioner's death sentence, with two Judges dissenting. *Jurek v. State, supra*, 522 S.W.2d at 940. Petitioner again challenged the constitutionality of his death sentence in a motion for rehearing which was denied on May 7, 1975.

SUMMARY OF ARGUMENT

I

The Texas legislature has provided a bifurcated trial procedure for selecting some convicted capital offenders to be killed while others live. The Texas Court of Criminal Appeals found the discretion inherent in this system desirable in that it preserved "that valuable element which permits individualization based on consideration of all extenuating circumstances" and preserved "the element of mercy." *Jurek v. State*, 522 S.W.2d 934, 940 (Tex. Cr. App. 1975). Detailed examination of the new statute and its use confirms that the freedom to grant—or to withhold—mercy on the basis of factors "too complex" (*id.* at 939) to be articulated or controlled continues to result in the imposition of life sentences and death sentences with "no meaningful basis for distinguishing" the people who get them. *Furman v.*

Georgia, 408 U.S. 238, 313 (1972) (concurring opinion of Mr. Justice White).

This capital sentencing discretion is only one of several mechanisms by which an arbitrary fraction of death-eligible offenders is selected to be actually put to death. Prosecutorial charging and plea-bargaining discretion, jury discretion to convict of one or another amorphously distinguished "capital" or non-capital crime, and gubernatorial discretion to grant or withhold clemency are all equally uncontrolled and uncontrollable. In its parts and as a whole, the process is inveterately capricious. To inflict death through such a process is to inflict unconstitutional cruel and unusual punishment within the fundamental historical concerns of the Eighth Amendment[18] that were recognized in *Furman v. Georgia, supra.*

II

The perpetuation of arbitrariness in post-*Furman* capital punishment schemes is not mere happenstance. The death penalty is too cruelly intolerable for our society to apply it regularly and even-handedly, and it is inherently too purposeless and irrational to be applied selectively on any reasoned, non-invidious basis. None of the justifications advanced to support the cruelty of killing a random smattering of prisoners annually survives examination in the light of the realities of this insensate lottery; and none begins, of course, to justify the killing of any particular human being while his undistinguishable

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[18] These concerns are documented in the Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at pp. 26-45, and we do not repeat that documentation in the present brief.

counterparts are spared in numbers that attest to our collective abhorrence of what we are doing to an outcast few.

ARGUMENT

I.

INTRODUCTION

Nearly four years ago, this Court decided, in *Branch v. Texas*, 408 U.S. 238 (1972),[19] that death sentences imposed under the then extant laws of Texas constituted unconstitutional cruel and unusual punishment.[20]

[19] *Branch v. Texas* was consolidated for hearing and decision with *Furman v. Georgia* and *Jackson v. Georgia*. It is designated hereafter by the lead case, *Furman v. Georgia*. The decision was given immediate effect by the setting aside of death sentences in *Curry v. Texas*, 408 U.S. 939 (1972); *Davis v. Texas*, 408 U.S. 937 (1972); *Huffman v. Beto*, 408 U.S. 936 (1972); *Jackson v. Beto*, 408 U.S. 937 (1972); *McKenzie v. Texas*, 408 U.S. 938 (1972); *Matthews v. Texas*, 408 U.S. 940 (1972); *Morales v. Texas*, 408 U.S. 938 (1972); *Stanley v. Texas*, 408 U.S. 939 (1972); *Tea v. Texas*, 408 U.S. 937 (1972); *Thames v. Texas*, 408 U.S. 937 (1972); *Wright v. Beto*, 408 U.S. 934 (1972); *Sellers v. Beto*, 408 U.S. 937 (1972); and *Smith v. Texas*, 408 U.S. 934 (1972).

[20] The Texas Court of Criminal Appeals subsequently ruled "that the holding in *Furman* and *Branch* rendered it impermissible under the Constitution of the United States to impose the death penalty under . . . then existing statutes [of the State of Texas]." *Lopez v. State*, 500 S.W.2d 844, 846 (Tex. Cr. App. 1973). *See also, Antwine v. State*, 486 S.W.2d 578 (Tex. Cr. App. 1972); *Cherry v. State*, 488 S.W.2d 744, 758 (Tex. Cr. App. 1972) (opinion on rehearing); and *Caraway v. State*, 489 S.W.2d 106, 113 (Tex. Cr. App. 1973) (opinion on rehearing).

In 1973, the Texas legislature enacted new sentencing procedures under which persons convicted of any of five categories of murder (hereafter called "capital murder")[21] might be sentenced to life imprisonment or to death by electrocution. When a defendant has been found guilty of capital murder, a separate sentencing hearing is conducted before the trial jury at which "evidence may be presented as to any matter that the court deems relevant to sentence," and "[t]he state and the defendant or his counsel shall be permitted to present argument for or against sentence of death." (Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(a)(1975-76 supp.), page 7 *supra*. The jury is then asked to determine the following issues beyond a reasonable doubt:[22]

> "(1) whether the conduct of the defendant that caused the death of the deceased was committed

[21] Murder with malice aforethought was made capital where:

> "(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;
>
> "(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;
>
> "(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
>
> "(4) the person committed the murder while escaping or attempting to escape from a penal institution; or
>
> "(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution."

Texas Penal Code, art. 1257 (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 4 *supra*.

[22] Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(c) (1975-76 supp.), page 8 *supra*.

deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(b)(1975-76 supp.), page 7 *supra*. "[I]t may not answer any issue 'yes' unless it agrees unanimously; and . . . it may not answer any issue 'no' unless ten or more jurors agree." Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(d)(1975-76 supp.), page 8 *supra*. Subsection (e) of Article 37.071 provides:

"If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life."

See page 9 *supra*. Subsection (f) provides for prompt, mandatory review by the Court of Criminal Appeals of judgments of convictions and sentences of death. Execution discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

When a jury fails to find beyond a reasonable doubt that a capital murder has been committed, it may convict the defendant of noncapital murder ("murder, with or

without malice")[23] or "of any other lesser included offense." Texas Penal Code, Art. 1257, subsection (c) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 4 *supra*.

In sustaining appellant's death sentence, a majority of the Texas Court of Criminal Appeals found that the State's 1973 capital punishment statutes "[limit] the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses"; "[limit] the jury's discretion on the range of punishment"; "direct and guide [jury sentencing] deliberations"; "channel the jury's consideration on punishment and effectively insure against the arbitrary and wanton imposition of the death penalty." *Jurek v. State*, 522 S.W.2d 934, 939 (Tex. Cr. App. 1975). The court was "inclined to believe that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula." *Ibid*. (footnote omitted) Noting that "[s]ome discretion is inherent and desirable in any system of justice, from arrest to final judgment", it concluded that "[t]he mere presence of discretion in the sentencing process does not render that procedure violative of *Furman*," *id*. at 940:

"If discretion in the assessment of punishment under a statute can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman* will be met."

Ibid. On the strength of its view that capital sentencing discretion in the State of Texas is now "reasonable and controlled," the court (with two judges dissenting)[24] affirmed petitioner's death sentence.

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[23] We have stated the law applicable to petitioner's trial. As indicated in notes 1 and 3 *supra*, the new Texas Penal Code effective January 1, 1974 substitutes "voluntary manslaughter" for "murder without malice" in the Texas grading structure.

[24] *See* page 11 *supra*.

In Part II *infra*, we will demonstrate that the sentencing discretion in Texas capital cases is neither reasonable nor controlled, and that this discretionary sentencing system—sandwiched between equally unregulated pre-sentence and post-sentence discretionary mechanisms—fails utterly to rationalize the decision to take or spare a defendant's life.

As a result, the consignment of Texas "capital" offenders to live or to die remains wholly arbitrary and capricious, in violation of *Furman v. Georgia, supra*. Next, in Part III, we will examine the relationship between the irregular use of the death penalty and the penalty's intrinsic irrationality and evolved intolerability as an instrument of contemporary penal policy. Used as it is and can be used in our society, capital punishment is not merely arbitrarily administered but is *fundamentally* arbitrary: the wanton infliction of excessive cruelty forbidden by the Eighth Amendment.

II.

THE ARBITRARY INFLICTION OF DEATH

Part II of the Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031 [hereinafter cited as Petitioner's *Fowler* Brief] has already documented at considerable length the breadth and arbitrariness of the discretion exercised at all stages of capital prosecutions under procedures common to Texas and other jurisdictions. To spare the Court repetitious reading, we will not duplicate that demonstration here, but will focus specifically on the local aspects of Texas law and practice which implement the uncontrolled and uncontrollable power of

prosecutors, judges, jurors and the governor to take or spare the lives of "capital" defendants on an *ad hoc* basis.[25] The manner in which the power is used is described more fully in Petitioner's *Fowler* Brief, at pp. 41-101; and we respectfully hope that the Court will consent to consider those pages in connection with our largely doctrinal discussion of Texas law here.

A. Prosecutorial Charging Discretion

The decision to prosecute and the choice of charges for which an indictment or indictments will be sought are left to the absolute discretion of Texas district or county attorneys. The Court of Criminal Appeals has repeatedly approved the doctrine of "carving" under which

> "the State may carve and prosecute for any offense it may elect which grows out of a single transaction."

Martinez v. State, 165 Tex. Cr. R. 244, 306 S.W.2d 131, 132 (1957) (involving a prosecution for assault with intent to murder where the victim died twenty-days later and the prosecution proved the death at trial). "The fact that an accused is guilty of a higher offense than alleged should be no defense, and it should not be open to him to object that he has not been indicted for the greater offense." *Nielson v. State*, 437 S.W.2d 862, 866 (Tex. Cr. App. 1969) (involving a prosecution for attempt to rape where the State's evidence proved either rape or assault

[25] Descriptions of the analogous local-law doctrines in Louisiana, Georgia, and Florida are contained in the respective Parts III of the Brief for Petitioner in *Roberts v. Louisiana*, No. 75-5844, and of the Briefs for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* in *Gregg v. Georgia*, No. 74-6257, and *Proffitt v. Florida*, No. 75-5706.

with intent to rape). *Accord: Lewis v. State*, 171 Tex. Cr. R. 231, 346 S.W.2d 608 (1961) (involving a prosecution for indecent exposure where the State's evidence proved a consummated rape). The practice of indicting for a lesser offense when the district attorney can (and does) prove a greater offense is one of which "the accused is in no position to complain." *Shannon v. State*, 170 Tex. Cr. R. 91, 338 S.W.2d 462, 466 (1960). See also *Vick v. State*, 397 S.W.2d 229 (Tex. Cr. App. 1965); *Nichols v. State*, 386 S.W.2d 795 (Tex. Cr. App. 1965); *Fuentes v. State*, 163 Tex. Cr. R. 410, 292 S.W.2d 117 (1956). Under the doctrine of carving, Texas prosecutors are not only permitted unreviewable descretion in deciding which of several charges a set of facts will support;[26] they are explicitly authorized to pick and choose among the several available charges, from grave to trivial, which are clearly established by proof of a given series of events.

After the indictment choice is made, the Texas prosecutor retains broad discretion to abandon the prosecution in whole or in its more severe parts.[27] He is required to obtain consent of the trial court and to state

[26] "The alert prosecutor who wishes to do so may find details with which he can invoke the death penalty. For example, in *State v. Kleasen*, Crim. No. 48461, Dist. Ct. of Travis County, 147th Judicial Dist. of Texas, June 2, 1975, the defendant was charged with capital murder on the grounds that two watches belonging to the deceased were found in his trailer. . . . [The Texas capital murder statute] was never meant to encompass such a technicality unless the state is seriously contending that the murder was committed for two watches." Case Note, 7 ST. MARY'S L.J. 454, 457, n.29 (1975).

[27] This discretion is frequently exercised. In *State v. Granviel*, 213th District Court in and for the Tarrant County, No. 4, 111, the defendant introduced testimony of a researcher who had examined the records of the Criminal District Clerk to determine the disposition of every homicide indictment in the county between July 1, 1973 and July 24, 1975. (Transcript of Proceedings, p. 82.) The researcher testified that of 142 homicide indictments filed during that period, 41 were capital. (*Id.* at 83.) Of these, seven had reached final disposition. (*Ibid.*)

(continued)

his reasons for dismissing charges,[28] but "the statute does not prescribe any particular reasons to be assigned; therefore . . . [the prosecuting attorney] may assign any reason which the court may deem sufficient upon which to base his action in dismissing the case." *Ex parte Rusk*, 128 Tex. Cr. R. 865, 79 S.W.2d 865, 866 (1935). The authority to dismiss an entire indictment has been held to encompass the implied authority to dismiss that portion of an indictment which charges a greater degree of criminal homicide, and to try the defendant for a lesser offense.

(footnote continued from preceding page)

> "In one of the cases the jury gave life imprisonment. In two of the cases the cases were dismissed. . . . [i]n one of the cases the jury gave the indictee ninety-nine years after the State waived the death penalty. In the one other case the jury gave the indictee thirty years after the State waived the death county [sic]. In the final case the indictee was given twenty-five years on a plea of guilty after the State waived the death count."

(*Id.* at 84.)

[28] Vernon's Tex. Code Crim. Pro. Ann., Art. 32.02 (1966), provides:

> ". . . the attorney representing the State may, by permission of the Court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge."

The requirement that the reasons for the dismissal be set forth in writing has been said to be "directory and not mandatory." *Ex parte Kensey*, 152 Tex. Cr. R. 425, 214 S.W.2d 628, 629 (1948). *See* also *Wallace v. State*, 145 Tex. Cr. R. 625, 170 S.W. 2d 762, 764 (1943); *Ex parte Rusk*, 128 Tex. Cr. R. 135, 79 S.W.2d 865, 866 (1935). An oral request for leave, followed by a dismissal order in which reasons for dismissal are incorporated, for example, constitutes substantial compliance and is not subject to challenge. *Ex parte Rusk, supra*, 79 S.W.2d at 866. See *Ex parte Traxler*, 147 Tex. Cr. R. 661, 184 S.W.2d 286 (1944).

> "An indictment for murder in the first degree including as it does, all the lesser degrees of culpable homicide, and the district and county attorney being authorized by law to dismiss the entire prosecution, if consented to by the trial judge, it follows that he has the authority to abandon the prosecution as to any degree of offense embraced within an indictment, if such action is sanctioned and approved by the trial judge. The granting of the greater power necessarily included the lesser power, and is clearly within the plain intent and meaning of the law as enacted by the Legislature."

Gentry v. State, 68 Tex. Cr. R. 567, 152 S.W. 635, 636-37 (1913). *See also Steward v. State*, 422 S.W.2d 733, 736 (Tex. Cr. App. 1968); *Wiley v. State*, 92 Tex. Cr. R. 395, 244 S.W. 538 (1922); *Clay v. State*, 70 Tex. Cr. R. 451, 157 S.W. 164 (1913). Dismissals may be used to avoid the procedural complexities of capital trial[29] in

[29] *See, e.g., Watson v. State*, 149 Tex. Cr. R. 643, 197 S.W.2d 1018, 1019 (1946):

> "When the present case was called for trial, the District Attorney filed a motion in writing, requesting the trial court to dismiss from the indictment the allegation and element of murder with malice aforethought in order that this cause could be tried without the necessity of a special venire; such dismissal in no way to affect the indictment with reference to murder without malice, which motion was by the trial court granted over the objection and exception of appellant. We see no error in thus allowing the State's Attorney to indicate to the court and appellant that he did not intend to try appellant for a capital offense."

Not only are capital trials complex, but capital convictions are subjected to special appellate scrutiny "in view of the extreme penalty," *Cherry v. State*, 488 S.W.2d 744, 753 (Tex. Cr. App. 1972); *Leza v. State*, 149 Tex. Cr. R. 448, 195 S.W.2d 552 (1946); *Salazar v. State*, 137 Tex. Cr. R. 448, 141 S.W.2d 761, 763 (1939), which can often lead to reversal, *see, e.g., Bird v. State*, 527 S.W.2d 891, 895 (Tex. Cr. App. 1975) ("In the present case appellant received the most extreme punishment authorized by law – death. The constitutional error in commenting on appellant's failure to testify cannot be said in the setting of this particular case to be so unimportant and insignificant that it may be deemed harmless.")

cases where the district attorney does not feel that the defendant deserves the death penalty or that community sentiment requires his pursuit of the death penalty.[30] The Court of Criminal Appeals has upheld the district attorney's power to dismiss more severe charges and proceed only upon lesser ones[31] because the effect of the practice is

> "*to mitigate the punishment* that could be assessed against the appellant. He certainly will not be heard to complain that this course was pursued by the state, and because the state saw fit to prosecute on a charge where the punishment was less it will not be held to have abandoned its right to develop all the facts occurring at the time the offense is alleged to have been committed."

Sweeney v. State, 103 Tex. Cr. R. 393, 281 S.W. 571, 572 (1926) (emphasis added) (involving a prosecution for robbery by assault with the use of firearms–then a capital offense).

[30] *Cf.* Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case–A Conversation with a Prosecuting Attorney*, 7 PRAC. LAW. (No. 7) 44, 53 (1961):

> "In many cases we believe we mitigate the harshness of the letter of the law by taking a guilty plea. We make such decisions only after much careful thought and I think we make them in a way that the community generally approves."

[31] The district attorney or county attorney may also dismiss an indictment against some codefendants, *Figaroa v. State*, 58 Tex. Cr. R. 611, 127 S.W. 193 (1910), or coconspirators, *Bass v. State*, 59 Tex. Cr. R. 186, 127 S.W. 1020 (1910), without prejudicing his right to proceed against the remaining codefendants or coconspirators.

B. Plea Bargaining

The power of a Texas prosecutor to limit the severity of punishment[32] through the acceptance of negotiated guilty pleas is unconstrained by the 1973 capital punishment statute or by any other significant restriction. Nothing in Texas law forbids the receipt of a guilty plea "motivated by a desire to avoid the death penalty," *Ex parte Black*, 457 S.W.2d 919, 921 (Tex. Cr. App. 1970),[33] or controls the prosecutor's choice to bargain or

[32] *See* Petitioner's *Fowler* Brief, at pp. 56-61.

[33] At the time that Black's guilty plea was entered–and also at the time of petitioner's trial–the provisions of Texas law relating to pre-plea proceedings were essentially identical. Vernon's Tex. Code Crim. Pro., Art. 26.13 (1966), provided:

> "If the defendant pleads guilty, or enters a plea of nolo contendere he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is sane, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt."

(Effective January 1, 1974, the word "sane" was changed to "mentally competent" by Tex. Acts 1973, 63rd Leg., p. 968, ch. 399, §2(A).) It was held that this provision was "mandatory, and that the three things required must be done as a condition precedent to the validity of the plea of guilty, and that such question may be raised after conviction." *May v. State*, 151 Tex. Cr. R. 534, 209 S.W.2d 606, 608 (1948); *see Ex parte Chavez*, 482 S.W.2d 175 (Tex. Cr. App. 1972). However, in a later line of cases the Texas Court of Criminal Appeals significantly attenuated these requirements. It held, for example, that "[c]ontrary to earlier decisions . . . in a collateral attack upon a plea of guilty there must be a showing that a defendant was prejudiced or injured for the failure of the trial court to fully comply with Article 26.13 . . .," *Ex parte Taylor*, 522 S.W.2d 479 (Tex. Cr. App. 1975); that "an affidavit in the record, executed by appellant and approved by the trial court . . . may . . . be used as a substitute for the trial court's personal admonishment . . .," *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Cr. App. 1975) (overruling *Toombs v. State*, 514 S.W.2d 259 (Tex. Cr. App. 1974); that "where there is no showing that a defendant was prejudiced or injured by the failure of the trial court to *fully* comply with Article 26.13 . . . and where no objection is

(continued)

not to bargain "on the basis of just that kind of ruleless 'discretion' that the Furman case seemed to be condemning when the life-or-death choice was made by a jury."[34]

Guilty pleas in Texas are taken in open court,[35] and evidence is then received for purposes of punishment.[36]

(footnote continued from preceding page)

made to such failure at the time the plea is accepted or by motion for new trial, that failure to fully comply will not constitute reversible error on appeal," *Guster v. State*, 522 S.W.2d 494, 495 (Tex. Cr. App. 1975) (emphasis in original); and that an admonishment which overstates the possible penalty for the crime to which the defendant pleads no longer constitutes reversible error, *Tellez v. State*, 522 S.W.2d 500 (Tex. Cr. App. 1975).

Effective June 19, 1975, Article 26.13 was amended to provide:

> "(a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:
>
> "(1) the range of punishment attached to the offense; and
>
> "(2) the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the court.
>
> "(b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary.
>
> "(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court."

Vernon's Tex. Code Crim. Pro., Art. 26.13 (1975-1976 supp.).

[34] BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 42 (1974).

[35] *See* Vernon's Tex. Code Crim. Pro., Art. 27.13 (1966).

[36] Vernon's Tex. Code Crim. Pro., Art. 26.14 (1966), provides:

> "Where a defendant in a case of felony persists in pleading guilty or in entering a plea of nolo contendere, if the punishment is not absolutely fixed by law, a jury shall be

(continued)

In noncapital cases, these proceedings can be had before the judge without a jury, if the defendant waives jury sentencing.[37] However, in capital cases, a waiver of jury

(footnote continued from preceding page)

impaneled to assess the punishment and evidence may be heard to enable them to decide thereupon, unless the defendant–in accordance with Articles 1.13 or 37.07 shall have waived his right to trial by jury."

" 'It is well established that a plea of guilty to a felony charge before a jury admits the existence of all facts necessary to establish guilt and, in such cases, the introduction of testimony by the State is to enable the jury to intelligently exercise the discretion which the law vests in them touching the penalty to be assessed, *Darden v. State*, 430 S.W.2d 494, 495 (Tex. Cr. App. 1968); *Reyna v. State*, 434 S.W.2d 362 (Tex. Cr. App. 1968)." *Hayes v. State*, 484 S.W.2d 922, 923 n.1 (Tex. Cr. App. 1972). A trial court has an obligation to withdraw a plea of guilty on its own motion "only where the evidence introduced makes evident the innocence of the accused or . . . reasonably and fairly raises an issue as to such fact and such evidence is not withdrawn." *Id.* at 924. For "a plea of guilty before a jury voluntarily and understandingly made is conclusive as to the defendant's guilt and waives all nonjurisdictional defects including claimed deprivation of federal constitutional due process." *Brown v. State*, 487 S.W.2d 86, 87 (Tex. Cr. App. 1972); *Carpenter v. State*, 477 S.W.2d 22 (Tex. Cr. App. 1972); *Gonzales v. State*, 458 S.W.2d 926 (Tex. Cr. App. 1970).

[37] *See* Vernon's Tex. Code Crim. Pro. Ann., Art. 26.14 (1966), set out in note 36 *supra*.

sentencing is not permitted;[38] so guilty pleas to capital charges must be made before a jury which then (in theory) deliberates upon evidence and determines sentence.[39] This procedural setting has dictated the traditional Texas device for implementing plea bargains in which a capitally charged defendant pleads guilty to the capital charge against him in consideration for a non-death sentence. Prior to plea, a jury is empaneled

[38] See Vernon's Tex. Code Crim. Pro. Ann., Art. 1.14 (1975-1976 supp.):

> "The defendant in a criminal prosecution for any offense may waive any rights secured him by law except the right of trial by jury in a capital felony case."

See also Lane v. State, 471 S.W.2d 854 (Tex. Cr. App. 1971). A guilty plea taken by a judge without a jury in a case where the indictment charges a capital offense is invalid (even though the judge imposes a noncapital sentence), *Ex parte Donahoo*, 166 Tex. Cr. R. 625, 317 S.W.2d 744 (1958), unless, prior to plea, the prosecution has "waived the right to ask for the infliction of the death penalty," *Ex parte Bell*, 143 Tex. Cr. R. 134, 157 S.W.2d 892, at 892 (1942). The indictment need not be amended or superseded: "the State [can] . . . abandon that part of the indictment alleging [the elements which make an offense capital] . . ., and [the defendant can] . . . then waive a jury and enter his plea of guilty to ordinary robbery before the court without a jury." *Ex parte Wagnon*, 136 Tex. Cr. R. 364, 125 S.W.2d 572, 573 (1939). The rule was essentially the same under a now-repealed statute which was in effect between 1966 and 1973. *See, e.g., Goffney v. State*, 489 S.W.2d 882 (Tex. Cr. App. 1973); *Ex parte Watkins*, 489 S.W.2d 617 (Tex. Cr. App. 1973); *Jackson v. State*, 478 S.W.2d 546 (Tex. Cr. App. 1972); *Clardy v. State*, 436 S.W.2d 535 (Tex. Cr. App. 1969). Repeal of the intervening statute returns Texas law to essentially the same statutory formulations under which *Bell* and *Wagnon, supra*, were decided. *Compare* Vernon's Tex. Code Crim. Pro. Ann., Arts. 1.13 (1966), 1.14 (1975-1976 supp.), *with* Tex. Acts 1931, 42nd Leg., p. 65, ch. 43, secs. 1, 2.

[39] *See, e.g., Ex parte Black*, 457 S.W.2d 919 (Tex. Cr. App. (1970).

consisting entirely of jurors who, upon voir dire, agree to follow the prosecutor's sentencing recommendation. The defendant's plea is then taken; the prosecutor recommends a non-capital disposition; and the jury unsurprisingly sentences the defendant to whatever the prosecutor recommends. *See, e.g., Parrish v. Beto*, 414 F.2d 770 (CA5 1969), wherein the "sentencing" jury consisted of two attorneys and two newspaper reporters who happened to be in the courthouse, three deputy sheriffs, and a district attorney's investigator. Evasion of capital sentences for "capital" convictions through this device was commonplace under Texas' pre-1973 form of discretionary capital punishment, *see, e.g., Jenkins v. Beto*, 442 F.2d 655 (CA5 1971); *Giles v. Beto*, 437 F.2d 192 (CA5 1971); *Chambers v. Beto*, 428 F.2d 791 (CA5 1970), and the device remains equally available under the more elaborate sentencing procedures of the 1973 statute[40] which (in theory) "direct and guide [the jury's sentencing] deliberations."[41] Alternatively, the prosecutor can apparently renounce any intention to assert that the circumstances necessary to support a capital sentence under Article 37.071(b)-(e) of the Code of Criminal Procedure[42] exist; and the defendant's plea of guilty can then be taken before any judge who is willing to receive

[40] The statute explicitly provides that "[*t*]*he State* and the defendant or his counsel *shall be permitted to present argument for or against the sentence of death*" during the penalty phase which follows "a finding that the defendant is guilty of a capital offense." Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071 (1975-76 Supp.), page 8 *supra*.

[41] *Jurek v. State*, 522 S.W.2d 934, 939 (Tex. Cr. App. 1975).

[42] Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(b) (1975-76 supp.), page 8 *supra*.

it.[43] Since the Texas courts freely countenance plea bargaining,[44] an agreeable judge should not be difficult to find in most cases. Finally, the prosecutor can—if he chooses—spare the defendant's life by agreeing to the entry of a plea of guilty to a non-capital lesser included offense. "What is true generally is certainly true in Texas: a plea to a reduced charge is valid"[45] and may be used to "nullify harsh, 'unrealistic' penalties that legislators have

[43] This practice is now being widely followed, seemingly under the authority of cases such as *Wagnon* and *Bell*, described in note 38 *supra*. For example, in *State v. Dowden*, Harris County District Ct. No. 25,031 (1975), a defendant indicted for capital murder changed his plea from not guilty to guilty, whereupon the State recommended a sentence of life imprisonment (Transcript of Pleadings, April 30, 1975, pp. 4-18), and a judge without a jury sentenced the defendant in accordance with this recommendation. *Id.* at p. 33.

[44] *See, e.g., Garza v. State*, 502 S.W.2d 155 (Tex. Cr. App. 1973); *Kincaid v. State*, 500 S.W.2d 487 (Tex. Cr. App. 1973); *Murphee v. State*, 500 S.W.2d 165 (Tex. Cr. App. 1973); *Gaither v. State*, 479 S.W.2d 50 (Tex. Cr. App. 1972); *Reyna v. State*, 478 S.W.2d 481 (Tex. Cr. App. 1972); *Ex parte Thomas*, 474 S.W.2d 238 (Tex. Cr. App. 1971).

[45] Bishop, *Guilty Pleas in Texas*, 24 BAYLOR L. REV. 301, 322 (1972). *See, e.g., Johnson v. State*, 442 S.W.2d 745 (Tex. Cr. App. 1969); *Bruce v. State*, 419 S.W.2d 647 (Tex. Cr. App. 1967); *Isaacs v. State*, 391 S.W.2d 421 (Tex. Cr. App. 1965); *Mock v. State*, 164 Tex. Cr. R. 335, 298 S.W.2d 583 (1957).

prescribed"[46] but which "in a particular situation seem unduly harsh"[47] to the prosecutor's way of thinking.[48]

C. Jury Discretion at the Guilt Phase

Like the North Carolina law described in Petitioner's *Fowler* Brief, at pp. 62-95, Texas law gives the jury a broad range of options during the guilt phase of a "capital" trial by which the jurors may (or may not) choose to spare the defendant's life. Any jury so inclined may avert a conviction for capital murder–which, of course, is the necessary predicate for the subsequent death penalty trial described at pages 56-68 *infra*–by convicting the defendant of a lesser included offense that nevertheless carries a sufficiently severe penalty to permit the jurors to give a "capitally" culpable defendant what they think he deserves.

Article 37.08 of the Texas Code of Criminal Procedure provides that

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[46] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1966).

See, for example, *State v. Livingston*, 119th Judicial District Court in and for Collins County, Texas, Nos. F-74-099-R, F-74-100-R & F-74-101-R (subsequently transferred to Criminal District Court No. 2, Dallas County, Texas, and assigned docket Nos. F-75-4543-I, F-75-5637-I & F-75-5638-I), where defendant was charged with three capital murders by indictments dated May 24, 1974. He pleaded guilty to noncapital murder and he received a sentence of twenty years imprisonment. (Judgment, May 19, 1975). The plea and judgment constituted final adjudication of the three capital indictments and of an outstanding murder charge in Waco, Texas.

[47] Heath, *Plea Bargaining–Justice off the Record*, 9 WASHBURN U. L. REV. 430, 455 (1970).

[48] The notion that the prosecutor is free to bargain or not to bargain with a defendant as he chooses is so universally accepted in Texas that we have been unable to find any cases in which it was challenged. It is simply assumed in *Rodriquez v. State*, 509 S.W.2d 319 (Tex. Cr. App. 1974).

> "In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense."[49]

It is not necessary that the lesser included offenses be specified in the indictment: under any indictment charging the greater offense, a jury may convict of the lessers.[50] And as we have seen at page 30 *supra*, the 1973 statute expressly decreed that in a capital murder prosecution, "[i]f the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated [as capital murder] . . . the defendant may be convicted of murder, with or without malice . . . or of any other lesser included offense."[50a]

Under Texas law, a defendant may demand a lesser-included-offense instruction as a matter of right whenever there is any evidence that could conceivably support a lesser conviction.[51] It is not necessary that defendant

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[49] Vernon's Tex. Code Crim. Pro. Ann., Art. 37.08 (1975-76 supp.).

[50] *Daniels v. State*, 464 S.W.2d 368 (Tex. Cr. App. 1971); *Evans v. State*, 402 S.W.2d 756 (Tex. Cr. App. 1966); *Brown v. State*, 376 S.W.2d 577 (Tex. Cr. App. 1964); *Garcia v. State*, 91 Tex. Cr. R. 9, 237 S.W. 279 (1922); *Gatlin v. State*, 86 Tex. Cr. R. 339, 217 S.W. 698 (1920); *Ciral v. State*, 83 Tex. Cr. R. 8, 200 S.W. 1088 (1918); *Crowder v. State*, 78 Tex. Cr. R. 344, 180 S.W. 706 (1916).

[50a] Texas Penal Code, Art. 1257, subsection (c) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)). As we have previously indicated, the new penal code which became effective on January 1, 1974, regraded noncapital homicide offenses in Texas so as to provide for noncapital "murder" and "voluntary manslaughter" in lieu of the prior "murder with malice" and "murder without malice." *See* note 3 *supra*.

[51] *Hargrove v. State*, 501 S.W.2d 878 (Tex. Cr. App. 1973); *Lucky v. State*, 495 S.W.2d 919 (Tex. Cr. App. 1973). The 1973 capital murder law expressly codified a defendant's right to a murder-without-malice charge where the facts presented the issue:

> "In all cases tried under the provisions of this Act it shall be the duty of the court, where the facts present the issue of

(continued)

present evidence to support a lesser charge;[52] the requirement of a charge on a lesser included offense may

(footnote continued from preceding page)

murder without malice, to instruct the jury that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person or ordinary temper sufficient to render the mind incapable of cool reflection, and in appropriate terms in the charge to apply the law to the facts as developed from the evidence."

Texas Penal Code, Art. 1257(c) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), pages 5-6 *supra*. "Murder without malice" and "murder with malice" were technically treated as alternate punishment categories within the single crime of "murder." *Taylor v. State*, 491 S.W.2d 922 (Tex. Cr. App. 1973); *Galloway v. State*, 420 S.W.2d 721 (Tex. Cr. App. 1967). But for all legal purposes other than double jeopardy, "murder without malice" could be viewed operationally as a lesser included offense of "murder with malice." *See* Vernon's Tex. Code Crim. Pro. Ann., Art. 37.09 (1975-76 supp.) defining a lesser included offense. Shortly before the 1973 capital punishment statute went into effect, the Court of Criminal Appeals held that since "[a]ll voluntary killings are murder, and the presence or absence of malice relates only to the punishment," it was "proper to submit the issue of malice only during the punishment stage" where the accused has waited until that stage of the trial to submit evidence raising the issue. *Brazile v. State*, 497 S.W.2d 302, 304 (Tex. Cr. App. 1973).

The cognate provision of the new penal code effective January 1, 1974, provides:

Voluntary Manslaughter

"(a) A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

(b) 'Sudden passion' means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(c) 'Adequate cause' means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection."

Vernon's Tex. Penal Code Ann., §19.04 (1974).

[52] *Armentrout v. State*, 515 S.W.2d 297 (Tex. Cr. App. 1974); *Ray v. State*, 515 S.W.2d 664 (Tex. Cr. App. 1974).

arise solely by virtue of evidence introduced by the State.[53] And if any part of a witness's testimony supports a lesser included offense, the lesser must be submitted notwithstanding the fact that contradictory portions of the witness's testimony refute the lesser, because the jury may choose to believe part but not all of the witness's testimony.[54] Although a trial judge is not *required* to submit a lesser included offense where there is no evidence to support it,[55] two settled principles of Texas law give him an incentive and discretion[56] to do so:

First, the Texas Court of Criminal Appeals has advised judges to err on the side of submitting lessers in a doubtful case. *McGee v. State*, 473 S.W.2d 11, 14 (Tex. Cr. App. 1975). For example, in *Blocker v. State*, 27 Tex. Cr. R. 16, 10 S.W. 439, 440 (1889), the court took "occasion . . . to suggest to trial judges that they should be exceedingly cautious in murder trials in declining to charge upon murder in the second degree. Instances are comparatively rare in which such a charge may be properly dispensed with." And, under the later statutory scheme in which degrees of murder were dispensed with, see note 85 *infra*, the court said that murder without malice should be submitted "even in a doubtful case," if raised by the evidence, *Armentrout v. State*, 515 S.W.2d 179, 299 (Tex. Cr. App. 1974), "whether it be strong, weak, unimpeached or contradicted," *Thompson v. State*, 521 S.W.2d 620, at 624 (Tex. Cr. App. 1974).

[53] *Carter v. State*, 515 S.W.2d 668 (Tex. Cr. App. 1974).

[54] *Thompson v. State*, 521 S.W.2d 621 (Tex. Cr. App. 1975).

[55] *See, e.g., Lamberson v. State*, 509 S.W.2d 328 (Tex. Cr. App. 1974).

[56] *See, e.g., Warren v. State*, 97 Tex. Cr. R. 487, 262 S.W. 500 (1924).

Second, a trial judge cannot err reversibly by submitting a lesser included offense where there is no evidence to support it. If there is evidence to support the greater offense, a conviction for the lesser will be sustained on appeal even though it has no factual support, because "[a] verdict is not contrary to law and evidence . . . where the defendant is found guilty of an offense of an inferior grade to, but of the same nature as the offense proved." Vernon's Tex. Code Crim. Pro. Ann., Art. 40.03(9) (1975-76 Supp.) *See Daniel v. State*, 464 S.W.2d 368, 370 (Tex. Cr. App. 1971); *McDonald v. State*, 462 S.W.2d 40, 41 n.1 (Tex. Cr. App. 1970) (dictum); *Carr v. State*, 158 Tex. Cr. R. 337, 255 S.W.2d 870, 873-74 (1953); *Little v. State*, 130 Tex. Cr. R. 603, 95 S.W.2d 141 (1936); *Carter v. State*, 121 Tex. Cr. R. 493, 51 S.W.2d 316 (1932); *cf. Ludwig v. State*, 164 Tex. Cr. R. 295, 298 S.W. 2d 166, 169 (1956).[57]

The reason for this rule was explained in *Burnett v. State*, 53 Tex. Cr. R. 515, 112 S.W. 74, 78 (1908):

> "[a]t best the grades and degrees of an unlawful killing are more or less arbitrary and the line between them sometimes difficult to be drawn."[58]

Accordingly, "[t]he decision as to the degree of offense one shall be found guilty of, if at all, is for the jury, and, if they err in giving a verdict in favor of a lesser degree, we know of no authority which gives to appellant any

[57] A jury may also convict of attempt even though the offense was completed. *Flores v. State*, 472 S.W.2d 146 (Tex. Cr. App. 1971); *Ward v. State*, 68 Tex. Cr. R. 154, 151 S.W. 1073 (1912).

[58] *Gray v. State*, 61 Tex. Cr. R. 454, 135 S.W. 1179, 1185 (1911), expanded on this explanation:

> "[O]ur lawmakers with rare wisdom and prescience . . . knew, . . . as we know, that these laws [of the degrees of homicide] were to be enforced and interpreted by men. They must have known that they would not be enforced with automatic regularity or the shadowy lines of precise degrees always followed with the precision of the map maker."

right or ground of complaint." *Gatlin v. State*, 86 Tex. Cr. R. 399, 217 S.W. 689, 702 (1919).[59] In *Wysong v. State*, 66 Tex. Cr. R. 201, 146 S.W. 941, 944 (1912), the Court concluded:

> "We doubt if the evidence presented the question of manslaughter, and we doubt if the court should have given a charge on manslaughter . . . [But] [i]t is the clear and unquestioned doctrine of this state fully settled and determined, that if the proof in the case shows murder in the first or second degree, and even does not show manslaughter, yet, where manslaughter is submitted and the jury find the appellant guilty thereof, that this court cannot, and will not, disturb the verdict."

The 1973 legislation creating five categories of capital murder, see note 21 *supra*, must be viewed against this background. In a felony-murder case, such as the district attorney elected to prosecute here,[60] the relevant category is defined by subsection (b)(2) of Article 1257 of the Penal Code[61] which makes "murder with malice aforethought" capital if:

> "the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson . . ."

Since a conviction of murder with malice itself requires a finding that the defendant "voluntarily kill[ed]" someone,[62] Article 1257(b)(2) asks the jury to draw the line

[59] In *Gatlin*, it was "clear from the record that deceased was cut by the appellant with a knife, from which wound he subsequently died." 217 S.W. at 700. The defendant, charged with homicide, was convicted of assault with intent to murder.

[60] *But see* pages 72-73 *infra*.

[61] Texas Penal Code, Art. 1257, subsection (b)(2) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 4 *supra*.

[62] Texas Penal Code, Art. 1256 (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 3 *supra*.

of life or death between the two subjective states of voluntariness and intentionality. This is no better than the traditional line of "premeditation and deliberation"[63] which Justice Cardozo characterized as "merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistably for the exercise of mercy."[64] As Professor Charles Black has recently written concerning such ungraspable mental elements:[65]

> "no matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve laypersons have no alternative to using their general sense of the equities of the matter. But this means that these purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent [when exercised in favor of life[66]] is to all intents and purposes standardless."

The jury is thus given license–contingent sometimes upon the exercise of antecedent discretion by the trial judge–to convict a capital defendant of a lesser offense. It may do so not only in cases in which the distinctions between offenses are blurred, but also in cases where conviction of the lesser offense would be wholly inconsistent with the facts proved. In the latter cases, the trial court's power to decline to submit the lessers to the jury does not regularize the process to any significant degree. It is merely another wild card. Petitioner's presiding judge, for example, charged the jury on murder without malice (D.R. 62-63), a verdict that would have averted

[63] *See* Petitioner's *Fowler* Brief, at pp. 65-76.
[64] CARDOZO, LAW AND LITERATURE 100 (1936).
[65] BLACK, *op cit. supra* note 34, at 49-50.
[66] *See id.* at 47, 93.

the possibility of capital punishment if the jury had chosen to return it.[67] Murder without malice, according to the applicable statute, must be charged "where the facts present the issue," and consists of murder "under the immediate influence of a sudden passion arising from an adequate cause [such] . . . as would commonly produce a degree of anger, rage, resentment or terror in a person or ordinary temper sufficient to render the mind incapable of cool reflection."[68] Notably, at the subsequent penalty phase of the trial, the judge did *not* charge on the issue–which the applicable statute also requires to be charged "if raised by the evidence"–"whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."[69] In the court's own view, then, the murder-without-malice submission was a sheer gratuity–an exercise of the judge's broad discretion to increase the breadth of the jury's.[70]

[67] Capital murder, at the time of petitioner's trial, was defined as "murder with malice aforethought" which *additionally* fell into one of the five categories set forth in note *supra*. *See* Texas Penal Code Art. 1257, subsection (b) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 4 *supra*.
[68] Texas Penal Code, Art. 1257(c) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), pages 5-6 *supra*. See note 85 *infra*.
[69] Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(b)(3) (1974), page 8 *supra*.
[70] The insanity defense provides another offramp from the route to a capital conviction in many cases, if the jury chooses to use it. Professor Black has pointed out that the defense is simultaneously most important and most intractable in potentially capital cases, since in other cases "[t]he 'insanity' problem is a problem in prudent management"–that is to say, a decision whether the defendant should be sent to one sort of institution or another–whereas in death cases "the 'insanity' problem changes character altogether and goes to the heart of our moral order." BLACK, *op. cit. supra* note 34, at 55. See generally *id.* at 50-55. At the time of petitioner's trial, Texas was committed to the McNaghten rule, *see, e.g., Fuller v. State*, 423 S.W.2d 924 (Tex. Cr. App. 1968); *Freeman v. State*, 166 Tex. Cr. R. 626, 317 S.W.2d 726 (1958), and placed the burden of proof on the defendant by a preponder-

(continued)

D. Jury Discretion at the Punishment Phase

It was the opinion of a majority of the Court of Criminal Appeals that sentencing discretion was preserved under the 1973 Texas death penalty statutes,[71] but was

(footnote continued from preceding page)
ance of the evidence, see, *e.g., Nilsson v. State*, 477 S.W.2d 592 (Tex. Cr. App. 1972); *Forder v. State*, 456 S.W.2d 378 (Tex. Cr. App. 1970), except in cases of a prior judgment of insanity, *see, e.g., Breland v. State*, 489 S.W.2d 623 (Tex. Cr. App. 1973), and in an amorphous class of cases where the defendant claimed that he was dazed and rendered unconscious (or perhaps "semiconscious" and therefore incapable of knowing the nature of his acts, *see Haley v. State*, 111 Tex. Cr. R. 144, 12 S.W.2d 225, 226 (1928)) by an assault on the part of the deceased, *see, e.g., Hurd v. State*, 515 S.W.2d 936, 942-944 (Tex. Cr. App. 1974); *Dent v. State*, 46 Tex. Cr. R. 166, 79 S.W. 525, 529-530 (1904). Cases regarding the amount of evidence necessary to raise the insanity issue show no consistency, *compare Guyton v. State*, 472 S.W.2d 130 (Tex. Cr. App. 1971), *with Epps v. State*, 110 Tex. Cr. R. 406, 10 S.W.2d 566 (1928); but it is clear that, once raised, the issue is committed to the unreviewable determination of the jury, *e.g., Hernandez v. State*, 157 Tex. Cr. R. 112, 247 S.W.2d 260 (1952); *Ross v. State*, 153 Tex. Cr. R. 312, 220 S.W.2d 137 (1949). It remains to be seen how much change in Texas insanity law will follow the enactment of Section 8.01 of the new penal code, effective January 1, 1974, which embodies a somewhat abbreviated version of the A.L.I. test. *See* Vernon's Tex. Penal Code Ann. §801 (1974).

[71] Holding in *Hovila v. State*, Tex. Cr. App. No. 49,396, decided April 30, 1975, that the standards set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), must be applied in trials conducted under the 1973 capital punishment legislation, the Court of Criminal Appeals said:

> "While the new statutes provide that the jury shall take an oath that they will not let the penalty involved affect their deliberations [the reference here is apparently to the death-qualification provision of section (d) of Article 1257, page 5 ***supra***] and requires them only to answer questions while the judge actually assesses punishment based on such answers, the fact remains that the jury will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment. To say that the jury's answers would not be affected by their attitude toward the death penalty as a punishment for crime simply because they will not bring forth the ultimate verdict would be to disregard the obvious. We will not engage in such tenuous reasoning."

Id., slip op. at 1.

sufficiently controlled to meet *Furman*'s prohibition against arbitrary infliction of capital sentences:

> "We are inclined to believe that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula. However, there are some factors which are readily apparent and are viable factors for the jury's consideration. In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the dominantion of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however, inflamed, could withstand. . . .[72]
>
> "Some discretion is inherent and desirable in any system of justice, from arrest to final judgment. . . . The mere presence of discretion in the sentencing process does not render that procedure violative of *Furman*. It is rather the quality of discretion and the manner in which it is applied that must be controlled. To eliminate all discretion on the part of the jury would be to risk elimination of

[72] The source of this passage, of course is the set of "aggravating circumstances" and "mitigating circumstances" contained in death-penalty legislation which (unlike Texas') follows the lead of the pre-*Furman* Model Penal Code. See AMERICAN LAW INSTITUTE, MODEL PENAL CODE §210.6 (P.O.D. 1962).

> that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence. If discretion in the assessment of punishment under a statute can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman* will be met.
>
> "After considerable reflection, we find that the statutes with which we are confronted today do meet this test."

Jurek v. State, 522 S.W.2d 934, 939-940 (Tex. Cr. App. 1975) (footnotes omitted); *but see id.* at 943-944 (opinion of Judge Odom, concurring in part and dissenting in part).

Examination of the statutory capital sentencing procedure confirms the court's conclusions that it involves "discretion" and invites "mercy" (or its opposite)[73] in

[73] Mercy

> "sounds good; somebody escapes death. The trouble is that if you turn the coin around, somebody else *suffers* death because the jury did *not* [choose to show mercy] . . . . And if the jury's *milder* verdict may be a function of its sympathies, then its *sterner* verdict, by inevitable logic, may be a function of its lack of sympathy."

BLACK, *op. cit. supra* note 34, at 47. See also id. at 93:

> "We tend to think of persons' being 'clearly guilty' of crimes for which they ought to die. Then some of them, by acts of pure grace, are spared. . . . After all, who can complain at not receiving a pure favor? . . .
>
> "The trouble is that the system may just as well be viewed, and with enormously higher accuracy, if numbers count, must be viewed, as one in which a few people are selected, without adequately shown or structured reason for their being selected, to die. The inevitable corollary of sparing some people through mere grace or favor is standardless condemnation of others. The thing that ought to impress us is the standardless condemnation; we have been looking too long at its mirror image; we should take courage and turn around."

the decision to spare or kill. The further conclusion that it controls capriciousness and discrimination, however, is unfounded.

We have seen that, upon the return of a capital murder conviction, the jury hears evidence "on any matter that the court deems relevant to sentence" and argument "for or against the sentence of death." *See* page 28 *supra*. The jurors are then asked to resolve three intensely subjective and impressionistic questions, each involving imponderable judgments of degree, none involving facts susceptible of proof or even of comprehension, and none of which impose the slightest discipline upon the lawyers', judges' or the jurors' freedom to range far afield in quest of cues to sympathy or outrage. (The Court of Criminal Appeals' conclusion that this statute permits consideration of a number of A.L.I.-model "aggravating" and "mitigating" circumstances (*see* note 72 *supra*)–while it is binding on this Court, of course, as a mater of state law–merely demonstrates the inkblot character of the three statutory inquiries.)

The jury is first asked to determine "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that . . . death . . . would result." Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(b)(1)(1974), page 8 *supra*. We have previously noted the historically established office of this kind of inquiry[74] to give the jury a "dispensing power . . . in a mystifying cloud of words."[75] The jury has *already* found that the defendant "voluntarily kill[ed]" the deceased before convicting him of murder;[76] it has

[74] *See* pages 52-53 *supra*; Petitioner's Fowler Brief, at pp. 67-68; BEDAU, THE DEATH PENALTY IN AMERICA 24 (rev. ed. 1967).

[75] CARDOZO, LAW AND LITERATURE 100 (1931).

[76] *See* note 62 *supra* and accompanying text.

already found, in a felony-murder case, that he "intentionally committed the murder" as a basis for concluding that the murder was capital murder;[77] now they are asked to determine whether the defendant's act was "deliberately" done and whether death was a reasonably expectable result. Surely the *third* such question, if not the second, embodies a distinction lacking any discernible basis in difference, and merely invites the jury "to conceal from itself its own response to sentiment, under the guise of resolving issues of evidential doubt."[78] When the same essential question is used both to establish a category, even the most conscientious decision-maker must be confused or appreciate that something else is on the agenda than a strictly factual answer.[79] "To say that the jury's answers would not be affected by their attitude toward the death penalty as a punishment for crime . . . would be to disregard the obvious." *Hovila v. State*, Tex. Cr. App. No. 49,393, decided April 30, 1975, slip op. at 1.

Next, the jury is asked to return a verdict as to "whether there is a probability that the defendant would commit criminal acts to violence that would constitute a continuing threat to society,"[80] Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(b)(2)(1974), page 8 *supra*. This sort of prognosticative inquiry has been described as a "question . . . that no human mind can answer."[81] But

[77] *See* page 52 *supra*.

[78] KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

[79] *See* Case Note, 7 ST. MARY'S L. J. 454, 461 (1975):

> "Juror Lewis reported that the jury's decision was based, not on their answers to three statutory questions, but on their fear that if the defendant were sentenced to life in prison 'he'll be out in no time.'

[80] The full passage from which this sentence is quoted is set out in note 71 *supra*.

[81] *People v. Morse*, 36 Cal. Rptr. 201, 60 Cal.2d 631, 388 P.2d 33, 40 (1964).

we may put aside for now the issue whether predictions of individual human behavior in the indeterminate future can be made in any meaningful way by trained professionals[82]—let alone by lay jurors at a criminal trial[83]—let alone (as a petitioner's case) by such lay jurors on the basis of one-line hearsay opinions by local citizens that a

[82] See, e.g. Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974); Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry*, 1 JOURNAL OF PSYCHIATRY AND 409 (1973).

Notably, predictions of dangerousness invariably err on the side of overinclusion. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); Steadman, *Follow-up on Baxstrom Patients Returned to Hospitals for the Criminally Insane*, 130 AM. J. PSYCHIATRY 317 (1973); See also Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL ED. 24 (1970). Moreover, "it seems likely that the poor, the mentally incompetent, the drifter and the black are more likely to be labelled in this way for social reasons unrelated to any violent behavior." Rubin, *Predictions of Dangerousness in Mentally Ill Criminals*, 27 ARCH. GEN. PSYCHIATRY 397, 405 (1972). It may well be—although the opacity of the jury's verdict under Texas procedures and the lack of any basis for that verdict in the record admittedly make for difficult guesswork—that evidence of petitioner's limited mental capacity (see note 8, *supra*) influenced the jury determination as to his "dangerousness." For although "there is a striking lack of empirical data clarifying the relationship between intelligence and anti-social behavior, "BROWN & COURTLESS, THE MENTALLY RETARDED OFFENDER 60 (Report submitted to the President's Commission on Law Enforcement and Administration of Justice 1967), the belief that " 'feebleminded-ness is the mother of crime, pauperism, and degeneracy." ' DAVIES, SOCIAL CONTROL OF THE MENTALLY DEFICIENT 87 (1930), is still widely held. *See* Guskin, *Social Psychologies of Mental Deficiency*, in ELLIS, HANDBOOK OF MENTAL DEFICIENCY 325 (1963).

[83] "[P]articipants in the judicial process are better equipped by their experience to construct and employ theories about what probably occurred in the past than they are to employ theories about what is likely to occur in the future." Dershowitz, *Pretrial Detention*, 57 A.B.A.J. 560, 562 (1971). In part this is so because

> "man is a complex entity and the world he inhabits is full of unexpected occurrences that cannot be catalogued and

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defendant's reputation for being peaceable and law-abiding is "bad." We may put aside even the narrower issue whether such predictions can be made with the degree of precision appropriate when the purpose of the inquiry is to label a human creature fit or unfit to continue to exist. For Texas' 1973 death penalty statute does not require the court to decide whether projections of future dangerousness can ever be more than arbitrary exercises in condemnation or compassion thinly masked as predictive judgments.

That question need not be reached here because the predictive judgment demanded by the statute is wholly unintelligible even as a speculation. It asks, in the first place, "whether there is a probability" that the defendant will commit future violent acts. Dissenting below, Judge Odom summarized the obvious problem with this question:

> "What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a "probability" that he will perform certain acts in the future? Did it mean, as the words read, is there *a* probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, yet is is some probability, *a* probability, and no one would say it is no probability or not a probability. It has been written: 'It is probable that many things will happen contrary to probability,'

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> predicted actuarially. Predictions of rare human events are even more difficult to make. . . ."

Ibid. And recidivism on the part of convicted murders is an exceedingly rare event. *See, e.g.*, Waldo, *The "Criminality Level" of Incarcerated Murderers and Non-Murderers*, 61 J. CRIM. L., CRIM. & POL. SCI. 60 (1970); Neithercutt, *Parole Violation Patterns and Commitment Offense*, 9 J. RESEARCH IN CRIME & DELINQ. 87 (1972).

> and 'A thousand probabilities do not make one fact.' The statute does not require a particular degree of probability but only directs that *some* probability need be found. The absence of a specification as to what degree of probability is required is itself a vagueness inherent in the term as used in this issue. Our common sense understanding of the term leaves the statute too vague to pass constitutional muster."

Jurek v. State, supra, 522 S.W.2d at 945 (concurring and dissenting opinion) (footnotes omitted) (emphasis in original). Similarly, Judge Roberts, noting that "a probability is simply a chance—however large or small," *id.* at 948 (dissenting opinion), concluded that

> "[petitioner's] punishment was decided to a significant degree by the answer to a question which—as a result of its vagueness and overbreadth—*could not have been answered in his favor*."

Ibid. (emphasis in original).

But even beyond this, the events of which a "probability" must be predicted are unascertainable. The prediction goes to whether the defendant will commit "criminal acts of violence that would constitute a continuing threat to society." But

> "[h]itting someone with your fist is a 'criminal act of violence'; does the section mean that a jury must vote to electrocute persons shown to be given to fisticuffs? If not, where is the line; Secondly, what is the difference between 'criminal acts of violence'

which *do*, and those which *do not*, 'constitute a *continuing* threat to society'?"[84]

Finally, the jury is asked to decide, "if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(b)(3)(1975-76 supp.). This question was not submitted to petitioner's jury, but we nonetheless make two brief points about it because it constitutes an additional, wholly erratic escape valve through which other capitally convicted men will be spared by the system that has decreed petitioner's death. First, the "provocation" question (subsection (b)(3)) like the "deliberateness" question (subsection (b)(1)) is one that the jury has *already* answered prior to convicting the defendant of capital murder;[85] and so it is either a

[84] BLACK, *op. cit. supra note* 34, at 63 (original emphasis). There is common agreement that, whether or not predictions of future dangerous conduct on the part of individual human beings can be made at all, they *cannot* be made unless both (1) the precise nature of the future conduct, and (2) the degree of probability with which it is to be predicted are clearly specified. *See, e.g.*, Rubin, *Predictions of Dangerousness in Mentally Ill Criminals*, 27 ARCH. GEN. PSYCHIATRY 397, 399 (1972); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717, 726, n.4 (1972). *See* Goldstein and Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 235, n.3 (1960).

[85] In order to place the defendant in the category of capital-murder convicts and subject him to the second stage of Texas' bifurcated trial procedure, the jury must first find him guilty of "murder with malice aforethought." Texas Penal Code, Art. 1257 subsection (b) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 4 *supra*. The characteristic which sets "murder with malice" off from "murder without malice" is the absence of "immediate passion arising from an adequate cause." *See* Texas Penal Code, Art. 1257(c) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 5 *supra*. The source of the passion must be provocation. This was the rule in Texas under the antecedent statute grading homicide as murder or manslaughter and making

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hopelessly confusing device for discriminating among defendants *within* the class of capital murderers, or an open invitation to the jurors to retract their own earlier findings in order to relieve some defendants of the necessity of dying. Second, the "provocation" question is bereft of intelligible meaning. The problem is not merely the impressionistic nature at the judgment "whether the [defendant's] . . . conduct . . . was unreasonable in response to the provocation." "Reasonableness," after all, is a term of wide use in the law. But *here* it is being used to distinguish *among* people *all* of whom have committed capital murder. What conceivable rationality could there be to a juror's answering this question: "No, the defendant's response to provocation was not unreasonable, like that of someone who should be electrocuted. It was *reasonable*, like that of someone who should be imprisoned for life for having committed murder with malice under statutorily-specified aggravating conditions."? The three life-or-death questions asked by the Texas statute, we might add, are hardly made more tractable by requiring them to be answered

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provocation and passion the touchstone of the latter, see, *e.g.*, *Wolf v. State*, 95 Tex. Cr. R. 237, 253 S.W. 267 (1923); *Pinkerton v. State*, 94 Tex. Cr. R. 127, 249 S.W. 1066 (1923); *Bell v. State*, 85 Tex. Cr. R. 475, 213 S.W. 647, 648 (1919); *Wisnoski v. State*, 68 Tex. Cr. R. 382, 153 S.W. 316, 318 (1913); *Williams v. State*, 67 Tex. Cr. 287, 148 S.W. 763, 770 (1912); *Wilson v. State*, 60 Tex. Cr. R. 1, 129 S.W. 613, 614 (1910); and we have found no Texas cases recognizing *unprovoked* passion under the "murder with malice"–"murder without malice" grading scheme that was in effect from 1927 until 1974, notwithstanding the absence of the word "provocation" in the definition of "murder without malice" in the latter scheme. Under the new penal code that became effective on January 1, 1974, Texas reverted to a murder-manslaughter grading pattern, and manslaughter is defined in terms of a "sudden passion" which is itself defined as "passion directly caused by and arising out of provocation by the individual killed or another acting with the individual killed. . . ." *See* Vernon's Tex. Penal Code. § 19.04 (1974), note 3 *supra*.

"beyond a reasonable doubt." Vernon's Tex. Code Crim. Pro. Ann., Art. 37.071(c) (1975-76 Supp.), page 8 *supra*. Indeed, it is difficult even to comprehend the notion of proving "beyond a reasonable doubt" that there is "a probability that a defendant will engage in future dangerous acts."

The jury which answers such inquiries is required by statute to be told at the outset of the trial that death is a possible outcome.[86] In light of the nature of the inquiries, its answers can hardly be thought to reflect anything more or less than its sentiments on "the question whether this defendant was fit to live."[87]

E. Executive Clemency

Article IV, Section II of the Texas Constitution gives the Governor, acting on the recommendation of the Board of Pardons and Paroles, unlimited authority to grant commutations in all criminal cases except treason

[86] Subsection (d) of Article 1257 provides:

> "If one of the circumstances or conditions enumerated in Subsection (b) of this Article is charged in an indictment, the prospective jurors shall be informed that a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged. No person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Texas Penal Code, Art. 1257 subsection (d) (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 5 *supra*.

[87] *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968).

and impeachment.[88] There is no restriction upon the discretion of the executive branch to grant or deny clemency in any case, nor is that discretion informed by any standards. The Legislature, which has the "power to regulate procedure before the Board of Pardons and Paroles" and to require that it keep records, has added to the constitutional scheme only a requirement that

> "When the Governor remits fines or forfeitures, or grants reprieves, commutation of punishment or pardons, he shall file in the office of the Secretary of State his reasons therefor."

Vernon's Tex. Code Crim. Pro. Ann., Art. 48.02 (1966).[89] And, in *Stanley v. State*, 490 S.W.2d 828, 834

[88] Vernon's Tex. Const. Ann., Art. IV, §1 (1955), provides in pertinent part:

> "In all criminal cases, except treason and impeachment, the Governor shall have the power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof to grant reprieves and commutations of punishment and pardons; and under such rules as the Legislature may prescribe, and upon the written recommendation and advice of a majority of the Board of Pardons and Paroles, he shall have the power to remit fines and forfeitures. The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke paroles and conditional pardons. With advice and consent of the Legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason."

[89] The internal rule, applicable in other felony cases, that the Board will consider only those cases in which a majority of the trial officials recommend clemency, is inapplicable in death cases. Commutation of a death sentence will also be considered upon the written request of the condemned person or his representative or upon the request of the Governor. *Commutation of Death Sentence to Lesser Penalty* (unpublished document on file with the Secretary of State of the State of Texas) (1975).

(Tex. Cr. App. 1972), the Court of Criminal Appeals held that a pardon was not invalid where

> "the Governor stated his reasons in his proclamation in these words: '. . . acting upon and because of the recommendation of the Board of Pardons and Paroles dated September 11, 1972.' We hold that such reasons comply with Art. 4, Sec. 11, Texas Constitution, and Art. 48.02 V.A.C.C.P."

Texas Governors have, by the exercise of this clemency power, spared the lives of a not inconsiderable proportion of condemned prisoners. Between 1950 and 1962 there were ninety-four executions in Texas and twenty-two commutations of capital sentences.[90] Thus, the lives of one-fifth of all persons scheduled to be executed were spared by the exercise of clemency over a twelve-year period.

The capital defendant who fails to escape the death penalty during the charging, plea-bargaining, guilt-and-degree-determining, and sentencing processes is thus subjected to a final lottery in which the Executive Department, "in its own discretion and without violating its trust or any statutory policy" may refuse to permit execution "no matter what the circumstances of the crime." *Furman v. Georgia, supra*, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

F. The Proceedings in Petitioner's Case

Petitioner's case exemplifies the quality of the decisions that can spell the difference between life and death under the Texas system which we have just described:

[90] Note, *Executive Clemency in Capital Cases*, 39 N.Y.L.U. REV. 136, 192 (1964).

(1) The prosecutor chose to charge petitioner with capital murder committed in the perpetration or attempted perpetration of forcible rape and kidnapping. Clearly another prosecutor might have concluded, quite responsibly, not to press a capital charge. The evidence of attempted *forcible* rape is paper-thin at best, consisting of (a) petitioner's admission that he had asked Wendy Adams "if she wanted to have sex with me, but she said no and started screaming . . .," and (b) testimony that, earlier the same day, petitioner had expressed an interest in having sexual intercourse with girls of Wendy Adams' age. (*See* pages 15-17 *supra*.) It is one thing to want (or to intend) to have intercourse; and it is another thing to intend—let alone to attempt—to have intercourse with someone who is unwilling, by means of force. Wendy Adams' body was not sexually molested, and it does not take a reader of *Of Mice and Men* to conclude that the lack of evidence of attempted forcible rape may have been because there was no attempted forcible rape. The kidnapping charge, on the other hand, was easily proved, but under a statute so broad that it is impossible to suppose that it is commonly enforced.[91] In making these points, we should state clearly that we are not minimizing petitioner's crime which was a terrible and shocking one. We *are* saying that a prosecutorial decision not to charge it as capital murder or to seek the death penalty for it would have been as plausible as the contrary decision that

[91] See note 12 *supra*. Under Texas Penal Code, Article 1177 (Appendix, Vol. IV, Vernon's Tex. Penal Code Ann. (1974)), page 6 *supra*, the offense of kidnapping, punishable by five to twenty-five years imprisonment, is made out by false imprisonment of a minor under 15 years of age, without force, and notwithstanding the minor's consent, if done with a purpose to conceal or take the minor from the possession of a parent or guardian.

petitioner's prosecutor made in the exercise of a discretion equally unaccountable whichever way it is used.

(2) Pursuant to statute (see pages 67-68 *supra*), petitioner's jury was told at the outset of the trial that the death penalty was potentially involved. In the course of *voir dire* examination of prosecutive jurors, the judge explained that

> "the questions that you are called upon to answer, whether it is two or three, you must answer them unanimously. In other words, you must answer them 'yes', if it is your decision that the death penalty should be invoked by the Court; not by you. It is mandatory on the part of the Judge to enter the sentence."[92]

(T. 260-61.) There was thus no doubt in the jurors' minds where the answers to the statutory questions led. They were to answer them yes "if it is your decision that the death penalty should be invoked by the Court."

(3) With this knowledge before the jury, the trial judge submitted possible verdicts of capital murder, non-capital murder with malice, non-capital murder without malice, and not guilty at the first phase of the bifurcated trial. (D.R. 61-63.) The exercise of judicial discretion in the submission of offenses is highlighted by the fact that the judge did *not* submit the issue of provocation at the subsequent penalty phase (*see* pages

[92] The jury was informed collectively on at least 6 occasions that a finding of guilty of capital murder would result in a sentence of life imprisonment or death and that affirmative answers to the three questions would result in a sentence of death. (T. 200, 260, 311, 542, 935.) Moreover, each member of the panel had been similarly enlightened during individual *voir dire*. (T. 467, 491-3, 659, 685, 705-07, 734, 947-48, 973-74, 1042-43, 1131-32, 1251-52.)

53-54 *supra*), although the evidence was either sufficient to raise both issues or none (*see* note 85 *supra* and accompanying text). The jury, instructed that a conviction of capital murder required it to find that the petitioner "did . . . unlawfully and intentionally with malice aforethought voluntarily kill Wendy Adams . . . while in the course of committing, or attempting to commit kidnapping and/or forcible rape" (D.R. 61), returned a verdict of "guilty of capital murder while in the course of committing or attempting to commit kidnapping and/or forcible rape" (D.R. 67). It had deliberated for one hour before reaching this verdict. (See page 10 *supra*.)

(4) After another hour and five minutes (see page 11 *supra*), the jury concluded its sentencing-phase deliberations by answering affirmatively the two questions whether "the conduct of the defendant . . . was committed deliberately and with the reasonable expectation that . . . death . . . would result," and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (D.R. 69-70). Apart from the trial testimony relating to the day of Wendy Adams' death, the only evidentiary basis for this latter sweeping finding was the testimony of four local residents, each of whom offered a one-line hearsay opinion that petitioner's general reputation in the community as a peaceable and law-abiding citizen was "bad." (*See* page 22 *supra*.) How much the jury may also have been affected by the knowledge of petitioner's mental stuntedness (*see* note 8 *supra*) and by the prosecutor's suggestion of two other unproved sex crimes during cross-examination of petitioner's father (*see* page 23 *supra*) is unfathomable.

* * *

These, then were the proceedings; and death was the outcome. Obviously, other outcomes were equally plausible if any "of a large number of actors,"[93] each wielding unbridled discretionary power over petitioner's fate, had concluded that he "deserved to be spared."[94] If the selection of those capital offenders who are to be put to death under Texas' 1973 capital punishment law involves a "discretion [that is] . . . reasonable and controlled rather than capricious and discriminatory," *Jurek v. State*, 522 S.W.2d at 940, there is no more evidence of that reasonableness and control in this record than on the face of the statute or of Texas' procedures for implementing it. Petitioner's death sentence is "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[95] He committed a horrendous crime, but it was a crime punishable by death only because the prosecutor and the jury chose to say so. This *Furman* forbids.

III.

THE EXCESSIVE CRUELTY OF DEATH

Additional grounds compel the conclusion that the penalty of death is an unconstitutionally cruel and unusual punishment in this last quarter of the Twentieth Century. We have set forth those grounds in

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[93] Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031, at pp. 75-76.

[94] *Ibid.*

[95] *Furman v. Georgia, supra*, 408 U.S. at 309 (concurring opinion of Mr. Justice Stewart).

Part III of Petitioner's *Fowler* Brief, at pp. 102-140,[96] and we adopt them here.[97] Our submission, summarily, is (1) that the unique characteristics of the death penalty demand a particularly exacting standard of judicial review under the Eighth and Fourteenth Amendments (Petitioner's *Fowler* Brief, at pp. 103-121);[98] (2) that, when tested under this standard, the obvious cruelty[99] of the extreme penalty[100] cannot

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[96] Part III of Petitioner's *Fowler* Brief is further documented by Appendices D and E to the same brief. *See also* Reply Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at pp. 2-8, 15-20 and Appendices B, C, and E thereto. Because the latter brief was not printed and was distributed to the Court on pages of an awkward size, we reproduce it (together with its appendices) as Appendix 2 to the present brief. It is hereafter cited as Petitioner's *Fowler* Reply Brief, and page references are made to the version contained in Appendix 2.

[97] As elsewhere in this present brief, we incorporate Petitioner's *Fowler* Brief by reference in order to spare the Court the burden of substantially repetitious reading. As counsel for petitioner Jerry Lane Jurek, however, we are necessarily concerned lest even the most efficient of shorthand devices deprive him of the Court's full consideration of arguments on which his life may depend. We must therefore implore the Court to consider the original text of Petitioner's *Fowler* Brief once again here. Our present one-sentence summary of forty pages of that brief is not intended as a substitute for the original.

[98] *See also Commonwealth v. O'Neal*, ____ Mass. ____, 339 N.E.2d 676, 678-681 (1975) (opinion of Chief Justice Tauro); 339 N.E.2d at 694 (opinion of Mr. Justice Wilkins). In *O'Neal*, a majority of the Supreme Judicial Court of Massachusetts held that the death penalty for rape-murder was a "cruel or unusual punishment" forbidden by Article 26 of the Massachusetts Declaration of Rights.

[99] *Furman v. Georgia, supra*, 408 U.S. at 314 (concurring opinion of Mr. Justice White). *See* Petitioner's *Fowler* Brief, at pp. 109-114.

[100] Like other euphemisms designed to draw a veil of "decent reticence" across the reality of killing human beings (*see* KOESTLER & ROLPH, HANGED BY THE NECK 11-12 (1961)), this phrase from the vernacular inevitably betrays the point that "[c]apital punishment, involving as it does the taking of life, is qualitatively different from other punishments." *Commonwealth v. O'Neal*, ____ Mass. ____, 339 N.E.2d 676, 680 (1975) (opinion of Chief Justice Tauro). *See* note 125 *infra*.

be found to be "justified by the social ends it was [legislatively] deemed to serve"[101] (Petitioner's *Fowler* Brief, at pp. 121-130);[102] and (3) that, while a judgment condemning capital punishment as excessively cruel[103] can thus be reached independently by

[101] *Furman v. Georgia, supra*, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

[102] The inadequacy of incapacitative, deterrent and retributive justifications to support the death penalty is further discussed in Petitioner's *Fowler* Reply Brief, at pp. 17-20 and Appendices C and E; and the discussion is updated by references to recently published materials in Appendix 3 to the present brief, *infra. See also Commonwealth v. O'Neal*, ____ Mass. ____, 339 N.E.2d 676, 681-688 (1975) (opinion of Chief Justice Tauro).

[103] An historical study published since the filing of Petitioner's *Fowler* Brief documents the concern of the Eighth Amendment's Framers against excessive punishments. Schwartz & Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975). *See also* BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 3 (1975). Schwartz and Wishingrad further underscore the point made in Petitioner's *Fowler* Brief, at pp. 26-45, and central to the holding of *Furman v. Georgia, supra*, that it is a mistake the view the Eighth Amendment as a single-purpose instrument directed against the isolated evil of barbarous punishments. Rather, like the other basic guarantees of the Bill of Rights, *see, e.g.*, LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968), the prohibition against cruel and unusual punishments reflects a constellation of related concerns–against savagery, excessiveness, and arbitrariness in the imposition of criminal penalties–and must be construed in the light of "the broader conceptions and principles that underlie" it. Schwartz & Wishingrad, *supra*, 24 BUFFALO L. REV. at 793 n.42; *see id.* at 784, 786-793, 815-816, 827; Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784-1798 (1970). As Mr. Justice Blackmun wrote while a Circuit Judge:

> "the emphasis is on man's basic dignity, on civilized precepts, and on flexibility and improvement in standards of decency as society progresses and matures . . . [B]road and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable."

Jackson v. Bishop, 404 F.2d 571, 579 (C.A. 8 1968).

this Court[104] in the exercise of its constitutional function to consider "all that the legislature did or could take into account,"[105] such a judgment is unmistakably confirmed by the history of the *use* of the death penalty in this country in this century, demonstrating a dramatically progressive reluctance "to impose or authorize the carrying out of a death sentence"[106] and amounting to a national repudiation of capital punishment that "could hardly be more complete without becoming absolute"[107] (Petitioner's *Fowler* Brief, at pp. 130-140).[108]

[104] Such a judgment was reached only recently by the Supreme Judicial Court of Massachusetts in the *O'Neal* case described in note 98 *supra*. Two of the four concurring Justices in *O'Neal* rested the invalidation of Massachusetts' death penalty for rape-murder upon state due-process grounds as well as state cruel-or-unusual-punishment grounds.

[105] *Weems v. United States*, 217 U.S. 349, 378-379 (1910). *See also United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

[106] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

[107] *Furman v. Georgia, supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan). *See* note 144 *infra.*

[108] This submission does not ignore the facts that 151 persons were committed to prison under death sentences in 1974, UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974*, Table 7, p. 26 (November 1975), and that, by our latest count, there are now 454 persons on death row in the United States under death sentences imposed since *Furman*. As raw numbers, these figures are not inconsiderable, but they represent only a fraction of the total number of cases in which death sentences might have been imposed. The size of the fraction is incalculable for the obvious reasons that (1) no reliable statistics are compiled regarding the numbers of potentially capital cases which receive non-capital dispositions as a result of discretionary decisions beginning with the initial police "papering" of the case and proceeding through conviction;

(continued)

This submission, unlike the submission in Parts II of Petitioner's *Fowler* Brief and of the present Brief, does not depend fundamentally upon the perpetuation of systems of arbitrary selectivity in the administration of capital punishment after *Furman*. It is, however, strongly reinforced in the context of such systems, where the few convicted defendants "whose execution is not averted by one of the avenues of discretionary

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and (2) there are extreme difficulties in estimating even the proportion of persons convicted of capital offenses who are sentenced to death, *see* Appendix F to Brief for Petitioner in *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027], at pp. 1f-3f. Nevertheless, it is obvious that a very large proportion of potentially "capital" cases are processed through to non-capital sentences under the various evasive mechanisms that characterize the administration of post-*Furman* death-penalty laws as described in Parts II of this brief and of Petitioner's *Fowler* Brief. *See, e.g.*, Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976). Furthermore, of course, substantial numbers of death-*sentenced* defendants are relieved of those sentences as a result of post-conviction judicial proceedings: "[t]he system has become one in which a substantial portion of those condemned are kept for years under the agonizing threat of death with intermittent reversals and retrials until such time as prosecutors or juries are willing to settle for sentences of life imprisonment." Barrett, *Anderson and the Judicial Function*, 45 SO. CALIF. L. REV. 739, 744 (1972). *See, e.g.*, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964); Petitioner's *Fowler* Brief, at pp. 95-100. Professor White has recently noted that, because "both 'mandatory' and 'guided discretionary' [death penalty statutes enacted after *Furman*] . . . function in a system of honey-combed with discretion," the "new systems of capital punishment [will probably] . . . not alter the fact that the death penalty is infrequently applied." White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 45 AM. J. ORTHOPSYCHIATRY 581, 587, 589 (1975) [hereafter cited as White]. But recognizing that "the rate at which executive clemency was granted under a jury-discretionary system will be likely to underestimate the number of communications to be expected under a 'mandatory' system," *id.* at 589 (footnote omitted), Professor White points out that the *total extent* to which post-*Furman* "mandatory" death sentences

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mercy or constitutional safeguard [are] . . . sent to their death because none of a large number of actors thought

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are averted in practice cannot now be known (or learned, except by a grisly experiment), since "[u]ntil a capital defendant is actually executed, it cannot be determined that the power of executive clemency will not be exercised to spare the defendant's life," *Id.* at 588 n.**.

Finally, there seems little doubt that the number of death sentences that continue to be imposed today—eight years and eight months after the last execution conducted in this country—is a function in part of the fact that many jurors do not regard a death sentence as "real" or believe that it will ever be carried out. *See* Leavy, *Mamie Lee Ward on Death Row*, 5 M.S. 70, 106 (Nov. 1975) ("None of the jurors I spoke to believed Mamie's death sentence would ever be carried out. North Carolina's last execution, in 1961, was only a distant memory to them."); Brief for Petitioner in *Aikens v. California, supra*, at pp. 40-41 n.78 ("Jurors are finding it easier to impose the death sentence in murder cases now because they believe it will never be carried out, William J. Stevens, Jr., assistant district attorney in charge of homicides, said yesterday. . . . Stevens emphasized that Governor Shapp has said no prisoner will be executed while he is in office. Prior to Shapp's inauguration last January, the state had observed an eight-year amnesty on imposition of the death penalty. . . . 'For me personally, it would resolve any residual doubts when I know it's a token gesture anyway.' "). *Compare* HUIE, THE EXECUTION OF PRIVATE SLOVIK 169 (5th Dell ed. 1974):

> "I think every member of the court thought that Slovik deserved to be shot; and we were convinced that, for the good of the division, he *ought* to be shot. But in honesty—and so that people who didn't have to go to war can understand this thing—this must be said: I don't think a single member of that court actually believed that Slovik would ever be shot. I know I didn't believe it. . . . I had no reason to believe it. . . . I knew what the practice had been. I thought that the sentence would be cut down, probably not by General Cota, but certainly by Theater Command. I don't say this is what I thought *should* happen; I say it is what I felt *would* happen. And I thought that not long after the war ended—two or three years maybe—Slovik would be a free man."

See also id. at 173, 188.

they deserved to be spared."[109] The fact that the administration of Texas' capital-punishment procedures is permeated with "avenues of discretionary mercy" comparable to those found in North Carolina and described in Petitioner's *Fowler* Brief,[110] is significant for several reasons.

First, procedures that permit the spotty and sporadic application of a uniquely harsh penalty thereby vitiate the restraints of decency and conscience which can otherwise be counted on to limit legislative choice and public toleration of punishments for crime. They defeat the assurance that the ordinary safeguards of the democratic process will confine criminal penalties within the bounds of contemporary civility, since even the most awful punishments–atrocities that could never command acceptance if they were uniformly and usually applied to any legally defined category of offenses or offenders–can be stomached when inflicted only on some isolated outcasts. This dilution of political responsibility is, we think, the most important single consequences of selective and arbitrary administration of the death penalty from the point of view of constitutional adjudication. But we note it only summarily here because we have discussed it in detail in earlier briefs.[111]

[109] Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031, at pp. 75-76.

[110] *Compare* pages 34-76 *supra with* Petitioner's *Fowler* Brief, at pp. 45-100.

[111] The central significance of the point in Eighth Amendment theory is developed in the Brief for Petitioner, *Aikens v. California*, 406 U.S. 814 (1972) [No. 68-5027], at pp. 13-27, appended to Petitioner's *Fowler* Reply Brief as Appendix B, at pp. 1b-15b. Its implications for the appropriate standard of judicial review under *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), are considered in Petitioner's *Fowler* Brief, at pp. 106-107; *see also* White, *supra*, note 108, at 589-590; and its importance in the substantive determination of the constitutionality of the death penalty is discussed in Petitioner's *Fowler* Brief at pp. 120, 133-139.

Second, the existence of a pervading network of mechanisms for averting the actual infliction of capital punishment upon death-eligible offenders makes it difficult to take seriously any assertion that the "legislative will is . . . frustrated if the penalty is never imposed. . . ."[112] Legislators are not unaware of the procedural systems within which their enactments operate; and anyone who has the faintest appreciation of the administration of systems of capital justice knows that statutes prescribing categories of "capital" offenses or offenders will be infrequently enforced by the execution of persons within those categories. To be sure, the legislative will *to have a death penalty on the books* is manifested.[113] But that kind of legislative will was also evidenced by the statutes of forty-one States and the Federal Government at the time of *Furman* and was understandably held insufficient to justify the actual infliction of death upon a random fraction of offenders while the larger number of their indistinguishable counterparts was spared consistently with the same legislative design.

Surely, also, under both pre-*Furman* and post-*Furman* statutes, legislatures have been willing to countenance the prospect of execution of any unusual

[112] *Furman v. Georgia, supra*, 408 U.S. at 311 (concurring opinion of Mr. Justice White).

[113] Thirty-five States have enacted some form of death penalty since *Furman*. These statutes vary considerably and, for the convenience of the Court, we have summarized them in Appendix A to Petitioner's *Fowler* Brief; Appendix A to Petitioner's *Fowler* Reply Brief; and Appendix 4 to the present brief. The death penalty provisions of the federal Antihijacking Act of 1974, 88 Stat. 409, amending 49 U.S.C. §1472, are set forth in Appendix A to the Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031.

individuals who may fortuitously fall into the meshes of a net through which many others escape. In that sense only (and equally under both forms of statutes) has the legislative judgment been made to exterminate life. Thus, when a particular human being is taken to the execution chamber and the question is asked what justification exists for killing *him*, the answer must inevitably be: no justification that distinguishes him from his survivors or explains why five or two or one, instead of fifty like offenders or no offenders, are being executed in Texas this year.

After *Furman* as before, the Texas Legislature's decision to enact a death penalty statute does not imply a determination that death is the necessary or even fitting punishment for any class of crime or criminal. It says only that death sentences can be tolerated for some fragment of defendants within the class—a fragment which may approach zero and which is selected by procedures that do not connect any particular defendant's death with the asserted reasons for putting him to death. *This* is the "legislative judgment"[114] regarding capital punishment's acceptance by modern society, its value as a deterrent, and society's need for it to reinforce social values and incapacitate dangerous offenders"[115] which this Court is now being urged uncritically to accept.[116]

Third, the fact demonstrated compellingly by Professor Charles Black,[117] that these selective procedures inevitably entail both mistake and caprice,[118] surely must enter into the constitutional evaluation whether

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[114] Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031, at pp. 10-11.

[115] *Ibid.*

[116] *Ibid.*

[117] BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

[118] The concepts are summarized in *id.* at 18-20, quoted in Petitioner's *Fowler* Brief, at pp. 42-43, n.63.

capital punishment is "cruel and unusual." There is no way to separate the legislative acceptance of killing people from acceptance of the consequences that some people will be killed wrongly and all will be killed arbitrarily. This again is the legislative judgment to which the Court's deference is sought as representing "the evolving standards of decency that mark the progress of a maturing society."[119]

Here, " 'procedure' and 'substance' lock and become one."[120] " 'Though the justice of God [or of the legislature] may indeed ordain that some should die, the justice of man is altogether and always insufficient for saying who these may be.' "[121] Certainly we would not dispute that risks of error and arbitrariness inhere in every human administration of justice. But in the "balancing process"[122] of Eighth Amendment adjudication,[123] the magnitude of the risk[124] in relation to the

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[119] *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Chief Justice Warren).

[120] BLACK, *op. cit. supra* note 117, at 96. *See* Petitioner's *Fowler* Reply Brief, at pp. 10-15.

[121] BLACK, *op. cit. supra* note 117, at 96.

[122] White, *supra* note 13, at 593.

[123] *See Furman v. Georgia, supra*, 408 U.S. at 307-308 (concurring opinion of Mr. Justice Stewart).

[124] Professor Black's book throughout demonstrates that the risk of capriciousness and error in the administration of capital punishment is great, and his conclusion is confirmed by consideration both of the procedures provided for processing "capital" cases in Texas, *see* pages 34-76 *supra*, and other States, *see, e.g.*, Petitioner's *Fowler* Brief, at pp. 41-101, and of the results of the administration of capital justice in the past, *see, e.g. Furman v. Georgia, supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White); Petitioner's *Fowler* Brief, at pp. 43-45, 136-139; note 146 *infra. See also* note 151 *infra.*

irremediability of its consequences[125] cannot properly be ignored.[126]

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[125] "It is the factors of ultimacy and irreversibility of the extreme punishment involved in the taking of human life that differentiates death as punishment from all other sanctions. While mutilation, exile, forfeiture, torture, imprisonment and all other forms of punishment have been characterized from time to time as more severe and cruel than necessary to accomplish the needs of society in repelling criminality, it is only the extinguishing of life itself that admits of no compensatory adjustment in the event it is determined that society was wrong or overly harsh in any given case. While the possibility of error does not render the imposition of death as punishment unconstitutional per se any more than does the possibility of error of conviction in non-capital cases, there is a fundamental distinction between death and imprisonment that requires the most severe punishment, at least, to be imposed in a procedure as free from inequity as humanly possible."

Morgan v. State, Tenn. Ct. Crim. App. No. 492 (Hamilton County), decided January 30, 1976, slip opinion at 4 (opinion of Galbreath, J.). (The *Morgan* decision is described in note 151 *infra*.) *See also* Bobbitt, *Book Review*, 84 YALE L.J. 1769, 1772-1773 (1975):

> "We usually tolerate the rough justice such distinctions impose in the criminal justice process—it is in part the source of the justified pride we take in the jury system—because we are aware of the scant utility of judgment by rote. In the situation of a capital penalty, however, this means that some people will be sent to die without anyone being able to say clearly why it is *they* who are dying. The ultimate character of death should, alone, account for the contrast of our horror at this prospect with our tolerance of similar ineffable decision making when the penalties are fines or imprisonment. . . .
>
> ". . . Those corrections or changes in law which represent the development of an ongoing system can be of no saving grace to a process that has put someone beyond its reach."

And see Burrill, *The Immorality of the Death Penalty*, 90 CHRISTIAN CENTURY 99, 101 (1973):

> "The death penalty is . . . the meeting out of an infallible penalty by a most assuredly fallible trial system."

[126] The magnitude of the risk in relation to the irremediability of its consequences was described aphoristically by Professors Kalven and Zeisel in their observation that, "[w]hatever the

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Fourth, this latter point changes critically all of the specific subquestions relevant to the ultimate question of the constitutional validity of capital punishment.[127] "[T]he question [of deterrence, for example] becomes: 'If the penalty of death cannot be imposed, given the limitations of our minds and institutions, without considerable measures of arbitrariness and mistake, does the execution of citizens, some for the wrong reason, some wrongly, and some for no reason at all, deter other citizens sufficiently better than long imprisonment?' "[128] "The issue of retribution similarly may be restated in this context. 'Is vengeance so indispensable a good that we should continue the capital penalty knowing that it is sometimes invoked irrationally and sometimes mistakenly, and sometimes arbitrarily forborne (even with the so-called mandatory statutues), with equally little justification?' "[129] Indeed, as Professor Herbert Wechsler has observed, the "issue of retribution" becomes a non-issue because the death penalty is not (and cannot be, under contemporary procedures and amid contemporary values) inflicted in a manner that conforms to any rational retributive objective.[130]

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differences on which [the] . . . decision [choosing some capital offenders to die while others live] hinges, they remain demeaningly trivial compared to the stakes." KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966).

[127] BLACK, *op. cit. supra* note 117, at 23-28.

[128] The point originates with Professor Black, in the pages cited in note 32 *supra*, but is here quoted in the summary formulation of Bobbitt, *Book Review*, 84 YALE L.J. 1769, 1774 (1975).

[129] *Ibid.* (same).

[130] *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 255 (1961), quoted in Petitioner's *Fowler* Brief, at pp. 125-126. *See also* Petitioner's *Fowler* Brief, at p. 126 n.203. *And see* note 151 *infra*.

Fifth, the on-again off-again infliction of capital punishment at levels which our society now finds tolerable fails entirely to serve the supposed penological justifications for the punishment,[131] and thus amounts to nothing more than "the pointless and needless extinction of human life with only marginal contributions to any discernible social or public purposes."[132] So inflicted, the death penalty becomes plainly excessive,[133] even if its theoretical justifications could be thought, under other conditions, to be more colorable than they are.[134]

Sixth, the punishment of death is the only criminal penalty used in this country today[135] which inevitably entails inflicting an unmeasurable amount of physical

[131] *See* Petitioner's *Fowler* Brief, at p. 139.

[132] *Furman v. Georgia, supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[133] *See Furman v. Georgia, supra*, 408 U.S. at 279-280, 300-305 (concurring opinion of Mr. Justice Brennan); *id.* at 309 (concurring opinion of Mr. Justice Stewart); *id.* at 312-313 (concurring opinion of Mr. Justice White); *id.* at 331-332, 342-359 (concurring opinion of Mr. Justice Marshall). *See also* Schwartz & Wishingrad, *supra* note 103, *passim.*

[134] In fact, the incapacitative, deterrent and retributive justifications advanced in support of capital punishment are not colorable under any conditions relevant to the rational choice of penal sanctions in contemporary society. *See* Petitioner's *Fowler* Brief, at pp. 121-130 and Appendix E; Petitioner's *Fowler* Reply Brief, at pp. 17-20 and Appendices C and E; Appendix 3 to the present brief, *infra; Commonwealth v. O'Neal*, ____ Mass. ____, 339 N.E.2d 676, 681-688 (1975) (opinion of Chief Justice Tauro).

[135] Appendix C to the Brief for Petitioner, *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027], collects the numerous harsh physical punishments which were authorized by law and commonly used in the United States at the time of the drafting and adoption of the Eighth Amendment.

pain[136] and a demonstrable amount of psychological anguish upon the sentenced man.[137] *See generally Jackson v. Bishop*, 404 F.2d 571, 577-581 (CA8 1968); *Nelson v. Heyne*, 491 F.2d 352, 354-357 (CA9 1974). While this Court early recognized that the Eighth Amendment stood as a barrier against "torture," *Wilkerson v. United States*, 99 U.S. 130, 136 (1879), and other excruciating forms of physical punishment and also prohibited "the unnecessary infliction of

[136] The epistemological problem here is obvious, for the physical pain experienced by an executed defendant is not susceptible to direct report. It is simply impossible to tell how rapidly oblivion comes, under any mode of execution. *See* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 246-273; (H.M.S.O. 1953) [Cmd. 8932]; Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1338 (1968); BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 306-309 (3d ed. 1959). Nevertheless, such evidence as is available suggests that there is time for momentary suffering at least. *See* Petitioner's *Fowler* Brief, at pp. 113-114 n.173.

[137] *See generally*, West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 694 (1975); Gallemore & Panton, *Inmate Responds to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167, 168-170 (1972); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 826-831 (1972). *Cf.* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962). Two defendants, condemned under post-*Furman* statutes, have committed suicide while awaiting appellate disposition of their cases. *State of Florida v. Walter Albert Carnes*, November 19, 1974, Duval County Circuit Court No. 74-2131 CF (Div. S), *Carnes v. State*, Florida, Sup. Ct. No. 46,673, *appeal dismissed*, July 16, 1975, 316 So.2d 292; *State of Texas v. John H. Devries*, conviction of capital murder, January 23, 1974, Jefferson County District Ct. Nos. 31,085, 31,086, cases dismissed on motion of State, November 17, 1975.

physical pain in the execution of the death sentence," *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947), it declared that the Amendment's protections did not forbid infliction of the pain inevitably involved in "the mere extinguishment of life," *Ex parte Kemmler*, 136 U.S. 436, 447 (1890).[138] However, an arbitrary and capricious application of the penalty is something more and vastly different than the mere extinguishment of life,[139] and invokes the "[p]rohibition against the *wanton infliction* of pain [that] has come into our law from the Bill of Rights of 1688." *Louisiana ex rel. Francis v. Resweber, supra*, 329 U.S. at 463 (emphasis added).

Finally, we suggest it is no accident that capital punishment is administered through procedures which are despairingly insufficient to preserve any reasonable expectation of an equitable, nonarbitrary application of the penalty. These procedures plainly manifest the atrocity and the basic irrationality of the punishment of death. *Because* the common consensus in our society regards death as too extreme a penalty for regular or even-handed use in even the narrowest class of generically-defined cases, it has proved impossible legislatively to prescribe objective categories of offenders for whom the penalty can be tolerated without wholesale evasion.[140] Thus we must and do use a host

[138] "[I]f the punishment prescribed for an offense against the laws of the State were . . . burning at the stake, crucifixion, breaking on the wheel or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." *Ex parte Kemmler* 136 U.S. 436, 446-447 (1890).

[139] *See* BLACK, *op. cit. supra* note 117, at 95.

[140] *See McGautha v. California*, 402 U.S. 183, 204-207 (1971); Brief for the United States as *amicus curiae* in *Fowler v. North Carolina*, No. 73-7031, at pp. 59-61.

of evasive mechanisms to winnow the ranks of the condemned upon the basis of *ir*regular, *non*objective and *non*even-handed criteria.

Because the death penalty bears no rational relation to any legitimate penal or social objective, it is impossible to construct a rational system for its administration. Any attempt must necessarily fail to devise a reasoned selective scheme for the application of a fundamentally unreasoned sanction. In what cases is it appropriate to apply a punishment which is equally purposeless in all cases? The problem goes to the root of the death penalty. It is reflected in Sir Ernest Gowers' conclusion after chairing the most systematic and extensive Twentieth Century inquiry into the subject:

> "Before serving on the Royal Commission . . . I should probably have said that I was in favour of the death penalty, and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study . . . gradually dispelled that feeling. In the end I became convinced that . . . so far from the sentimental approach leading into [the abolitionists'] . . . camp and the rational one into that of the supporters, it was the other way about."[141]

Capital punishment is *innately* sentimental and antirational.[142] Its incoherent and invidious applications are not merely the price we pay for having it; they are the sole commodities purchased for the price. There exist no coherent or non-invidious reasons for choosing anyone to inhale gas or undergo electric shock until he is dead.

[141] GOWERS, A LIFE FOR A LIFE 8 (1956).

[142] *See, e.g.*, BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 31 (2d ed. 1951).

In this case and its companion cases, the respective States (and the Federal Government as *amicus curiae*) are essentially asking the Court to allow them to conduct further experiments in the practice of killing people which the national experience of this century has shown to be (1) an absolute penological failure,[143] (2) so abhorrent to contemporary American processes of justice that the discretionary operation of those processes has demonstrated its repudiation in the most eloquent possible manner, by sparing from execution all but a "bare sample of the culprits whose conduct [made] . . . them eligible for [it],"[144] and (3) the

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[143] *See* Petitioner's *Fowler* Brief, at pp. 121-130 and Appendix E; Petitioner's *Fowler* Reply Brief, at pp. 17-20 and Appendices C and E; Appendix 3 to the present brief, *infra.*

[144] Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 252-253 (1961). Professor Wechsler speaks here on the death penalty at a time (1930-1959) when it was used far more frequently ("with executions ranging from 199 to 48," *id.* at 252) than it is used today. Subsequent commentators concur in describing a precipitous decline in the actual use of the penalty, to a point where "[t]he most salient characteristic of capital punishment is that it is infrequently applied," PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967). *See, e.g.*, II NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1350-1351 (G.P.O. 1970) ("a de facto abolition has practically become a reality in the United States"); Sellin, *Executions in the United States*, in SELLIN, CAPITAL PUNISHMENT 31, 34 (1967); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1791-1792 (1970); Reckless, *The Use of the Death Penalty–A Factual Statement* 15 CRIME & DELINQ. 43, 50 (1969). The total number of persons executed under civil authority in the United States in each of the following representative years and five-year periods was:

1930 – 155	1930 - 1934 – 776
1935 – 199	1935 - 1939 – 891
1940 – 124	1940 - 1944 – 645
1945 – 117	1945 - 1949 – 639

(continued)

source of an always arbitrary[145] and frequently discriminatory[146] infliction of death that can decently

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1950 – 82	1950 - 1954 – 413
1955 – 76	1955 - 1959 – 304
1960 – 56	1960 - 1964 – 181
1965 – 7	1965 - 1969 – 10
1970 – 0	1970 - 1974 – 0

Source: UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974*, Table 1, pp. 16-17 (November 1975).

This American development is, of course, consistent with the "phenomenal decline" of executions on a world-wide scale, Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 408 (1965), which we have described in Appendix D to Petitioner's *Fowler* Brief.

[145] *See Furman v. Georgia, supra.*

[146] Racial discrimination in the application of the death penalty for rape has been sufficiently blatant to allow of overwhelming statistical proof.

> "Over two dozen possibly aggravating non-racial variables that might have accounted for the higher proportion of blacks than whites sentenced to death upon conviction of rape have been analyzed. Not one of these nonracial factors has withstood the tests of statistical significance. That is, in none of the seven states carefully analyzed can it be said that any of the nonracial factors account for the statistically significant and disproportionate number of blacks sentences to death for rape. . . . All the nonracial factors in each of the states analyzed 'washout,' that is, they have no bearing on the imposition of the death penalty in disproportionate numbers upon blacks. The only variable of statistical significance that remains is race.
>
> ". . . [S]entences of death have been imposed on blacks, compared to whites, in a way that exceeds any statistical notion of chance or fortuity. . . . [W]ith the benefit of a carefully designed and objectively analyzed study of [control] . . . conditions, it can be concluded that the significant racial differentials found in the imposition of the death penalty are indeed produced by racial discrimination."

Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119, 132-133 (1973).

be viewed only as an enduring cause of national shame. But the death penalty in any form is no longer an experiment: it is an ancient exercise in savagery that has run its course. The time is too late now to rectify

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A similarly overwhelming comprehensive demonstration of racial discrimination has concededly not yet been made in connection with the death penalty for murder. This is hardly surprising, in light of (1) the costs and difficulties of undertaking the sort of elaborately controlled and exhaustive study done by Wolfgang and Riedel in rape cases, and (2) the over-all rarity of use of the death penalty, coupled with its application through procedures (and with results) whose irregularity resists reduction into patterns that might serve as controls for a study of the racial factor, *see* notes 108, 144 *supra*; note 151 *infra*. But, if racial discrimination in death sentencing for murder has not been conclusively proved, there is at least very strong evidence of it in (A) the concurrence of results among several limited empirical studies that have been done, *see* Petitioner's *Fowler* Brief, pp. 136-137 n.226; (B) the coincidence of those results with the impressions of knowledgeable and responsible observers, *ibid.*; (C) the appearance in the rape studies of the same "indigent/non-indigent" racial sentencing pattern observed in murder cases, *see* Bullock, *Significance of the Racial Factor in the Length of Prison Sentences*, 52 J. CRIM. L., CRIM. & POL. SCI. 411 (1961)—that is, the tendency to treat black defendants disproportionately harshly *if* their victims are white, *see* Wolfgang & Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975); and (D) the intuitive implausibility of the hypothesis that the same people, operating through the same procedures in rape and murder cases, have practiced racial discrimination in the rape cases but risen scrupulously above its influence when the charge is murder.

Indeed, in a recent study of 142 post-*Furman* death sentences imposed after murder convictions in the States of Florida, Georgia, Louisiana, North Carolina, Oklahoma, and Texas, Professor Riedel has noted that 87% of these cases involved victims who were white. Riedel, *Death Row 1975: A Study of Offenders Sentenced Under Post-Furman Statutes*, 49 TEMPLE L. Q. 261 (1976). [We are informed by the editors of the Temple Law Quarterly that this article will appear in March, 1976.] *Compare* Klebba, *Mortality Trends for Homicide, by Age, Color and Sex: United States, 1960-1972* (National Center for Health Statistics, Division of Vital Statistics, 1974) at 2-3 (more than half of the total number of homicide victims during 1972 were nonwhite).

the errors of the past; such, of course, is the nature of capital punishment. It is not too late—nor is it too early—to prevent the repetition of those errors in the future.[147] Legitimate experimentation with new peno-

[147] The evidence described in footnote 146 *supra* allows no comforting explanation of the obvious fact that historically "Negroes [have been] . . . executed far more often than whites in proportion to their percentage of the population," *Furman v. Georgia, supra*, 408 U.S. at 364 (concurring opinion of Mr. Justice Marshall). *See also* the additional authorities collected in *id.* at 364-365 n.152. Against this background, it is sobering to note that the percentage of nonwhites in the death row population according to the latest officially reported count (December 31, 1974) was not significantly different than their percentage in the official count of December 31, 1971, just preceding *Furman*. Prior to *Furman*, nonwhites comprised 329 out of a total of 620 inmates (that is, 53.1%). UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-1, *Capital Punishment 1971-1972*, Table 10, pp. 39-40 (December 1974). On December 31, 1974, nonwhites comprised 138 out of a total of 254 inmates (that is, 54.3%). UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS, Bulletin No. SD-NPS-CP-3, *Capital Punishment 1974*, Table 16, pp. 44-45 (November 1975).

These figures might seem to imply that the percentage of nonwhites sentenced to death pursuant to post-*Furman* death-sentencing procedures has not declined as compared with the percentage sentenced to death under the avowedly discretionary pre-*Furman* death sentencing procedures. That conclusion appears correct; but we do not wish to leave the impression that the NPS figures support it, since we are factually advised that they do not. The NAACP Legal Defense and Educational Fund, Inc., maintains an independent roster of death-row inmates, and we therefore know that the figure of 254 persons listed by NPS as "under sentence of death" on December 31, 1974, includes a considerable number of inmates sentenced to die before *Furman* whose sentences had not yet (for various reasons) been technically vacated, although they could no longer constitutionally be carried out. Our figures do support the same conclusion, however. They were last systematically updated on February 25, 1976, at which time we were aware of 454 death-row inmates

(continued)

logical methods is unquestionably desirable,[148] and the limits set upon it by the Constitution[149] must necessarily be not too confining.[150] Nevertheless, the limits of the Eighth Amendment are exceeded when the subject of the exercise is extermination of human life and when its results can be foredoubted only by the blindest self-delusion.

Can there be doubt what a resumption of capital punishment in this country will show? During another couple of generations, a freakishly selected quota of

(footnote continued from preceding page)
sentenced after *Furman* and knew the race of 414 of them. Among the 414, nonwhites numbered 258 (62.3%), while whites numbered 156 (37.7%). Thus, even on the extremely unlikely assumption that *every* death row inmate whose race was unknown to us was white, nonwhites comprised (on February 25, 1976) 56.8% of persons held under death sentences imposed pursuant to post-*Furman* procedures, as compared with 53.1% of persons held (on December 31, 1971) under death sentences imposed pursuant to pre-*Furman* procedures.

[148] This is why one of the tragic features of capital punishment is its tendency to absorb public attention through sensationalism while simultaneously providing a political placebo for the fear of crime. As a result, legislative and administrative failures to pursue real and realistic solutions to the complex, difficult problems of controlling criminal behavior are ignored. *Cf.* West, *Psychiatric Reflections on the Death Penalty*, 45 AM. J. ORTHOPSYCHIATRY 689, 692-693 (1975).

[149] *See, e.g., Robinson v. California*, 370 U.S. 660 (1962); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *and see* Justice Jackson's concurring opinion in *id.* at 546-547:

> "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality . . . of a minority—even those who have been guilty of . . . crime."

[150] *See, e.g., Tigner v. Texas*, 310 U.S. 141 (1940).

offenders[151] will be killed after much agonizing and in progressively diminishing numbers until the death

[151] *See Furman v. Georgia, supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart). Freakish selection continues to be inevitable under procedures such as those described in Parts II of this brief and of Petitioner's *Fowler* Brief, wherein a large number of decisionmakers (many of them operating in only one or a very few cases) make innumerable life-or-death decisions through the resolution of vaguely defined issues whose relation to the choice of life or death is problematic. In this setting, any regularity of results is made impossible by the basic obscurity of the reasons for inflicting capital punishment, and the consequently wide variability of views regarding the cases (if any) in which the death penalty is tolerable. Issues of this nature peculiarly call into play "the natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion," BLACK, *op. cit. supra* note 117, especially when the differences between the possible conclusions—to kill a human being or to let him live—are out of all proportion to the legal and factual distinctions upon which they turn, *see* KALVEN & ZEISEL, *op. cit. supra* note 126, as quoted therein. Prejudice and discrimination are also most likely to prevail in this setting. *See* note 146 *supra*; Petitioner's *Fowler* Reply Brief, at pp. 12-15. But freakish (if not discriminatory) results are assured even upon the assumption that every individual involved in the decision of capital cases always and unfailingly acts with the utmost conscientiousness and good will. *See* BLACK, *op. cit. supra* note 117, at 94. For death is too extreme and extraordinary a penalty for conscientious, well-intentioned persons in our society to decree through solemn judicial proceedings without first making an intensely-felt condemnatory judgment that permits them to suspend their sense of common human brotherhood with the prisoner. The collision of such strong emotions as the need to express outrage at a criminal atrocity and the abhorrence of participating in a legal one cannot possibly produce a coherent or consistent pattern of such judgments. As different decision-makers differ in their reactions to the gravity of the responsibility that they hold and the imponderability of the decision that they are obliged to make, so, too, will their particular judgments differ. *Id.* at 16-17, 21, 46-47, 49-50.

Three consequences follow. (1) Within any group of indistinguishable offenders (*i.e.*, those whose offenses and personal characteristics differ only in details that no rational mind could deem relevant to a choice of punishment), some will be killed and some will be spared. (2) The decision to kill or to spare

(continued)

penalty falls of its own weight or until its last remnants are judicially condemned upon evidence of its historical

(footnote continued from preceding page)

distinguishable offenders will be made haphazardly because differing prosecutors, judges, juries and governors will choose differentially to act upon or to ignore available distinctions among the offenses or personal characteristics of these offenders, *See, e.g.*, KALVEN & ZEISEL, *op. cit. supra* note 126, at 438-439, 444; and the same characteristic (intoxication, drug addition, mental abnormality short of insanity, prior relations between the defendant and victim, etc.) may arouse the sympathy of one decision-maker and the antipathy of another. (3) Even distinctions that are repeatedly made in the selection of offenders to live or die need not conform to the legislative purposes for authorizing capital punishment or to the justifications for capital punishment which are now being urged upon this Court in support of its constitutionality; and the fact that a distinction is frequently made (or that a factor is commonly given decisive weight in the selection of defendants to live or die) does *not* mean that the distinction (or the factor) will not be inexplicably and capriciously ignored by particular decision-makers in particular cases, *see id.* at 435-444; Note, *A Study of the California Penalty Jury in First Degree Murder Cases*, 21 STAN. L. REV. 1299, 1420 (1969). In all of these regards, nothing has changed since *Furman. See* Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 661-662 (1974), quoted in Petitioner's *Fowler* Brief, at pp. 44-45; White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 DUQ. L. REV. 279, 289 n.69 (1974). *See also Morgan v. State*, Tenn. Ct. Crim. App. No. 492 (Hamilton County), decided January 30, 1976, slip opinion at 9 (opinion of Russell, J.):

> "The Tennessee statutes providing for the death penalty for first degree murder . . . facially make the punishment mandatory. This, however, is but a sham of the clearest transparency. All charges of first degree murder include second degree (as well as other lesser included offenses); and the legislature increased the maximum punishment for second degree murder to life. With all respect to my brethren who held in *Collins v. State* . . . that our death penalty statute is constitutional, in that very case, wherein the defendant was charged with two first degree murders committed at the same time and in substantially the same way, the jury found one of them to be first degree, setting

(continued)

repudiation that can scarcely be clearer then than now. But what earthly purpose can these deaths serve?

CONCLUSION

The death penalty imposed upon petitioner Jerry Lane Jurek should be held to be a cruel and unusual punishment forbidden by the Eighth and Fourteenth

(footnote continued from preceding page)

> death by electrocution, and found the other to be second degree, setting a ninety-nine year prison sentence.
>
> "I have no empirical data on the history of the use of this relatively new (1974) statute, but the half dozen or so death penalty appeals that have reached panels of this court that I have sat upon demonstrate clearly (1) that it is not being regularly set in murder cases, and (2) some of the cases, like *Collins*, are internally inconsistent. One pending case involves a felony murder in which two of the three defendants were found guilty of first degree murder and sentenced to death, while the third was convicted of only voluntary manslaughter for his participation in the same robbery-murder."

In the *Morgan* case, a panel of the Tennessee Court of Criminal Appeals (with one dissenter) held Tennessee's 1974 death-penalty statute (described in Petitioner's *Fowler* Brief, at App. A, pp. 57a-58a) unconstitutional under *Furman v. Georgia, supra*, because, although "mandatory" in form, it was administered through discretionary mechanisms such as we have described in Parts II of this brief and of Petitioner's *Fowler* Brief. As noted in the passage of Judge Russell's opinion just quoted, another panel of the same court sustained the constitutionality of the statute in *Collins v. State*, Tenn. Ct. Crim. App., No. 63 (Hamblen County), decided September 26, 1975; and the issue is now before the Supreme Court of Tennessee.

Amendments. The judgment of the Texas Court of Criminal Appeals should accordingly be reversed insofar as it affirms petitioner's death sentence.

Respectfully submitted,

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APPENDIX 1*

Persons Under Sentence of Death in the State of Texas

Raymond Riles (black) sentence determined December 11, 1975, Harris County Dist. Ct., 179th Judicial Dist., No. 224, 779 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

John Shippy (white) sentence determined November 12, 1975, Beh County Dist. Ct., 27th Judicial Dist., No. 23, 781 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Edward Edwin Corley (white) sentence determined November 7, 1975, McLennan County Dist. Ct., 54th Judicial Dist., *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Kenneth Granviel (black) sentence determined November 6, 1975 T'arrant County Dist. Ct., 213th Judicial Dist., No. 4, 11 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Don Louie Warren (white) sentence determined November 6, 1975, Lubbock County Dist. Ct., 72nd Judicial Dist., No. 15, 860 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

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*The Texas Court of Criminal Appeals has reversed the convictions of two former Death Row inmates. *Bird v. State*, 527 S.W.2d 891 (Tex. Cr. App. 1975); *Hovila v. State.* ____ S.W.2d ____ (Tex. Cr. App., opinion dated April 30, 1975. On November 17, 1975, the appeal of the former Death Row inmate John H. DeVries was dismissed (Order dated November 17, 1975) after Mr. DeVries' death, by apparent suicide.

Richard Vargas (Mex. Am.) sentence determined October 20, 1975, Harris County Dist. Ct., 208th Judicial Dist., No. 226, 631.

Moses Lopez Garcia (Mex. Am.) sentence determined October 20, 1975, Harris County Dist. Ct., 185th Judicial Dist., No. 219, 306 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Ronald Chambers (black) sentence determined September 18, 1975, Dallas County Crim. Dist. Ct. No. 4, No. F-75-4282KK *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Jesse Villareal (Mex. Am.) sentence determined August 5, 1975, Harris County Dist. Ct., 182nd Judicial Dist., No. 227, 850 *appeal pending* Ct. of Crim. Appeals of Texas, No. 50878.

Fred T. Durrough (white) sentence determined June 19, 1975, Bexas County Dist. Ct., 175th Judicial Dist., No. 74-CR-2140A *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Robert E. Kleason (white) sentence determined June 10, 1975, Travis County Dist. Ct., 167th Judicial Dist., No. 48462 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Roger Stark O'Brien (white) sentence determined June 4, 1975, Harris County Dist. Ct., 209th Judicial Dist., No. 200323 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Ignacio Cuevas (Mex. Am.) sentence determined April 4, 1975, Harris County Dist. Ct., 177th Judicial Dist., No. 219833 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Calvin Woodkins (black) sentence determined April 1, 1975, Harris County Dist. Ct., 71st Judicial Dist., No. 1581 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Doyle Skillern (white) sentence determined March 1, 1975, Live Oak County Dist. Ct., 36th Judicial Dist., No. 1996 *appeal pending* Ct. of Crim. Appeals of Texas [no appelate number filed].

Albert Castro (Mex. Am.) sentence determined February 25, 1975, Bexar County Dist. Ct., 144th Judicial Dist., No. 74-CR-2869-A *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Wilber Collins (black) sentence determined February 7, 1975, McLennan County Dist. Ct., 54th Judicial Dist., No. 75-9-C *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number filed].

Kenneth Brock (white) sentence determined February 4, 1975, Harris County Dist. Ct., 27th Judicial Dist., No. 21320 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Selwyn B. Gholson (black) sentence determined February 3, 1975, Ector County Dist. Ct., 27th Judicial Dist., No. 22,412 *appeal pending* Ct. of Crim. Appeals of Texas, No. 51,920.

Larry Ross (black) sentence determined February 3, 1975, Ector County Dist. Ct., 27th Judicial Dist., No. 22411 *appeal pending* Ct. of Crim. Appeals of Texas, No. 51,921.

Anderson Hughes (black) sentence determined January 20, 1975, 5th Crim. Dist. Ct. of Dallas County, No. F-74-10214 HL *appeal pending* Ct. of Crim. Appeals of Texas, No. 51,827.

Robert Lee White (black) sentence determined January 1, 1975, Lubbock County Dist. Ct., 137th Judicial Dist., No. 15,715 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Walter Bell (black) sentence determined December 27, 1974, Jefferson County Dist. Ct., 27th Judicial Dist., No. 31679 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Excell White (white) sentence determined August 19, 1974, Cullin County Dist. Ct., 199th Judicial Dist., No. F-74-101R *appeal pending* Ct. of Crim. Appeals of Texas, No. 51,123.

James Livingston (white) sentence determined August 12, 1974, 3rd Crim. Dist. Ct. of Dallas County, No. F-74-10996-JJ.

Jesse R. Jones (black) sentence determined August 12, 1974, Dallas County 3rd Crim. Dist. Ct., No. F-74-3543-P.J. *appeal pending* Ct. of Crim. Appeals of Texas, No. 50629.

Howie R. Robinson (black) sentence determined July 29, 1974, Dallas County Crim. Ct., 204th Judicial Dist., No. C-74-3195-PQ *appeal pending* Ct. of Crim. Appeals, No. 51,800.

Mark Milton Moore (black) sentence determined May 15, 1974 1st Crim. Dist. Ct. of Dallas County, No. F-74-3180-PH *appeal pending* Ct. of Crim. Appeals of Texas, No. 51801.

Leonard Freeman (white) sentence determined May 9, 1974, Atascosa County Dist. Ct., No. 5816 *appeal pending* Ct. of Crim. Appeals of Texas, No. 51,505.

Doyle Glenn Boulware (white) sentence determined May 4, 1974, 4th Crim. Dist. Ct. of Dallas County, No. F-74-1299-QK *appeal pending* Ct. of Crim. Appeals of Texas No. 50,524.

Ernest B. Smith (black) sentence determined March 3, 1974, Dallas County Crim. Ct., 195th Judicial Dist., No. C-73-12659-IN *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

James Burns (white) sentence determined February 22, 1974 Ector County Dist. Ct. 161st Judicial Dist., No. B-7459 *appeal pending* Ct. of Crim. Appeals of Texas [no appellate number assigned].

Jerry Lane Jurek (white) sentence determined February 2, 1974, Dewitt County Dist. Ct., 24th Judicial Dist., No. 75-5491 *aff'd* 522 S.W.2d 934 (Tex. Cr. App. 1975) *cert. granted* 44 U.S.L.W. 3439 January 22, 1976.

APPENDIX 2

REPLY BRIEF FOR PETITIONER

Fowler v. North Carolina
No. 73-7031

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE
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REPLY BRIEF FOR PETITIONER

Because the opening briefs of the parties and *amici*[1] have been lengthy, we confine this reply brief to short

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[1] The briefs will hereinafter be cited as follows:

Brief for Petitioner is cited as Pet. Br. ____.
Brief for Respondent North Carolina is cited as N.C. Br. ____.
Brief for California as *Amicus Curiae* is cited as Cal. Br. ____.
Brief for Utah as *Amicus Curiae* is cited as U. Br. ____.
Brief for the United States as *Amicus Curiae* is cited as U.S. Br. ____.

compass.[2] As respondent notes (N.C. Br. 8-9),[3] our Eighth Amendment argument in this Court has two aspects.[4] We consider separately the responses made to each.

---

[2] Even in a case whose subject matter was less important than life and death, we would think it ill-fitting to rise to points of personal privilege in connection with the implications of the portions of N.C. Br. 18-22 titled "correction of erroneous statements in Petitioners [sic] Brief." We know that the Court will have carefully read both the "erroneous statements" and the "correction[s]" of them, and we rest secure in the Court's judgment as to where the errors lie.

[3] *See also* U.S. Br. 2.

[4] North Carolina's "Query" (N.C. Br. 8, n.4) as to whether the Petition for Certiorari properly raises that aspect of our argument which is based upon *Furman v. Georgia*, 408 U.S. 238 (1972), is an insubstantial query. The Question Presented in the Petition for Certiorari is: "Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?" Petition for Writ of Certiorari to the Supreme Court of North Carolina, *Fowler v. North Carolina*, No. 73-7031 (filed July 9, 1974) at 2. It was modeled on the question framed in *Furman*: " 'Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?' " 408 U.S. at 239, except that it makes explicit reference to the "law of North Carolina" upon which we rely in the *Furman* aspect of our argument. *See* Pet. Br. 45-101. The Supreme Court of North Carolina experienced no difficulty in identifying the two-phased nature of our Eighth Amendment contention; it rejected both phases together after describing them as follows: "Defendant ... contends that the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments [and by] ... the Constitution of North Carolina. He further contends that capital punishment in North Carolina is still imposed in a selective and arbitrary manner, in violation of *Furman v. Georgia*...." (A. 103). *See also* Grouping of Exceptions and Assignments of Error in the North Carolina Supreme Court, A. 88.

First, however, we acknowledge a point that is common to both aspects of our argument and is quite properly the mainstay of all the responding briefs. (*See* N.C. Br. 24-30, 39-40, 42-46, 49; Cal. Br. 9-13, 22-23; Ut. Br. 16; U.S. Br. 5-6, 8-11, 23-24, 29-32, 46-55, 77.) This is the point that a large measure of deference is due by the Judiciary to legislative choice and to the autonomy of the States in fixing punishments for crime. No one disputes it. Certainly we do not. The question of the proper scope of judicial deference was a critical issue in *Furman*, and it is a critical issue here.

But the necessity for deference creates – it does not resolve away – the "ordeal of judgment"[5] that lies at the heart of the institution of judicial review under the Constitution. Time and again this Court is required to make excruciatingly difficult constitutional decisions "bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."[6] "Inevitably, then, there will be occasions when [the Court] . . . will differ with Congress or state legislatures with respect to the validity of punishment."[7] To talk about judicial deference as though it were an *answer* – indeed, the only legitimate answer – on each of these occasions both oversimplifies the judicial role and disregards its inherent difficulty.

We have tried not to understate that difficulty. *See* Pet. Br. 103-106. The legislative determinations of "at

[5] *Trop v. Dulles*, 356 U.S. 86, 194 (1958) (plurality opinion of Chief Justice Warren).

[6] *Ibid.*

[7] *Furman v. Georgia, supra*, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

least 31 states and the United States since *Furman*" (U.S. Br. 77)[8] are assuredly entitled to respect in the process of decision of this case, although we agree with the Government that "[i]t also [is] . . . helpful to determine the reason why society [has] . . . not rid itself of the apparently aberrant punishment without the need for judicial intervention" (U.S. Br. 8). The latter inquiry is undertaken at Pet. Br. 131-140.[9] We have not suggested that the question of the appropriate *scope* of judicial review here can be resolved simply by pointing to Article III of the Constitution, any more than by pointing to its Preamble (N.C. Br. 25-27) or to the "proposition that the federal government is one of limited powers" (N.C. Br. 44). If, in the exercise of one of those limited powers – the power of the federal Judiciary to test the federal constitutionality of a State's judgment to take the life of a citizen – this Court concludes that "the legislative judgment on these matters should be accepted by the judicial arm" (U.S.

[8] Since the filing of petitioner's opening brief, the State of Virginia has enacted a death penalty statute which applies to three kinds of murder. This statute is summarized in Appendix A, *infra*.

[9] Those pages are concerned with the difference between the function of a legislature to respond politically to indicators of public conscience and the function of the courts to rationally interpret indicators of public conscience. *See* Appendix B, *infra*, at 8b-13b. They thus respond to the question posed by the Government (U.S. Br. 31) whether invalidation of the death penalty would not require this Court to conclude that the legislatures of thirty-one States and Congress were unresponsive to the standards of decency of their electorates.

Br. 11),[10] we do not pretend that that decision will entirely prostrate Article III. Nor will a contrary decision by the Court – disagreeing with legislative judgment as to the constitutional permissibility of a particular form of punishment – entirely prostrate the power of the States to "insure domestic tranquility" under the Preamble (N.C. Br. 25),[11] or substitute "an anomalous referendum among judges as a proxy for the 'true' will of the electorate" (U.S. Br. 47). Questions of the scope of judicial review are always matters of degree, not poster-color slogans. That is why we have tried, at Pet. Br. 106-121, to articulate the specific considerations which support the specific standard of review of the death penalty that we have asked the Court to make under the Eighth Amendment.

[10] The full sentence in the Government's brief (U.S. Br. 10-11) is: "Although there may be legitimate differences of opinion regarding capital punishment's acceptance by modern society, its value as a deterrent, and society's need for it to reinforce social values and incapacitate dangerous offenders, those differences of opinion are to be resolved by the legislature; and the legislative judgment on these matters should be accepted by the judicial arm." Of course this is true insofar as opinions on the three questions stated by the Government are relevant to the question of the wisdom of capital punishment, but it is *not* true insofar as opinions on the same three questions enter into the judgment of constitutionality. Legislative judgment on matters of policy is indisputably conclusive; legislative judgment on constitutional issues, while entitled to respect, cannot conceivably be "accepted" as conclusive by the judiciary; and formulations which confuse the two judgments simply because both involve attention to some of the same ingredients do little to enlighten the process of constitutional decision-making.

[11] *Cf.* the Government's quotation from Goodhart (U.S. Br. 42): "'A community which is too ready to forgive the wrongdoer may end by condoning crime.'" Presumably the form of condonation implied here is a conviction of murder followed by a sentence of life imprisonment. The equation of a restriction upon the power to punish capitally with a restriction upon the power to protect society by the choice of effective punishments begs a major question in this case.

Among matters of degree, however, there are larger and smaller differences. Two large differences are central to this case. First, death as a punishment is different than any lesser punishment (*see* Pet. Br. 107-120; BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 29-36 (1974); and arguments that treat the killing of a human being as fungible with other state experiments in the science of penology (*see, e.g.*, U.S. Br. 43), or suggest that Eighth Amendment restraints upon the one are "equally" applicable to the others (U.S. Br. 57), defy reality as much as they ignore authority. *See Furman v. Georgia, supra.* Second, while the scope of Eighth Amendment review that we urge here – turning as it does upon the unique character of the penalty of death – leaves legislatures *virtually* unimpeded in the fashioning of punishments for crime as they see fit, the scope of review urged by the respondent and its supporting *amici* leaves the Eighth Amendment *virtually* unenforceable.[12] The Government candidly admits as

[12] *E.g.*, U.S. Br. 8-9: "When a penalty is enacted by a legislature and imposed only by a unanimous jury, the sanction is very unlikely to be outside the bounds of social tolerance.... Were this Court to hold the death penalty unconstitutional, it would have to conclude that it–whose justices are not elected and have been given life tenure in order to insulate them from popular and political opinion–is more conscious of and more responsive to the will of the people than are the representatives directly elected by and responsible to those people.... But if the people are to give their verdict of what is cruel and unusual, the people–through their elected representatives and through juries–must sit in judgment." *See also* U.S. Br. 29: "Thus, if a penalty can pass the dual tests of enactment by the people's representatives, and application by the people themselves sitting as a jury, it is almost certainly not so cruel, disproportionate, or repulsive to the sensibilities of modern society that it is forbidden by the cruel and unusual punishments clause."

much when it opines that "desuetude . . . was probably the proper 'fate' of the amendment in light of its history" (U.S. Br. 23-24).[13] It is not obvious how the Government squares this requiem for the Eighth Amendment with *Robinson v. California*, 370 U.S. 660 (1962),[14] let alone with *Furman*. In a companion case to *Furman*, the petitioner's brief suggested that judicial review of certain forms of legislation under the Cruel and Unusual Punishments Clause is neither an atavistic nor a dispensable safeguard in the American structure of democratic, majoritarian government. We append that discussion,[15] which is fully applicable to post-*Furman* death penalty legislation for the reasons set forth at Pet. Br. 131-133.

1. The Perpetuation of Arbitrary Selectivity Under North Carolina's "Mandatory" Capital Punishment Procedures.

Respondent does not controvert our description of North Carolina practice in "capital" cases (Pet. Br.

[13] Desuetude would certainly be the fate of the Amendment if this Court's prior Eighth Amendment decisions were limited according to the Government's explanation of them (with the notable omission of *Furman*) at U.S. Br. 24-27—each decision painted into an isolated and disjointed corner, so that no coherent or intelligible principles of Eighth Amendment jurisprudence survive.

[14] The Government's discussion of *Robinson* (U.S. Br. 26-27) fails to explain why, under its theory of the Eighth Amendment, a legislative judgment to treat particular conduct as criminal is entitled to less judicial deference than a legislative judgment regarding the particular punishment to be imposed for criminal conduct.

[15] Pages 13-27 of the Brief for Petitioner in *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027], are attached as Appendix B, *infra*.

45-100)[16] and of the numerous uncontrolled selective processes that cumulatively choose some men to actually die from among the larger number who are capitally punishable under North Carolina's broad range of capital offenses.[17] (N.C. Br. 13, 33-39). Rather, these processes are defended on the ground that each choice is made "in good faith, upon oath, according to the law and evidence" (N.C. Br. 37). We question no one's good faith. But good faith is obviously not sufficient to avoid irregularity and arbitrariness when innumerable separate prosecutors, judges, jurors and Governors make unnumerable life-or-death decisions the *least* discretionary of which are defined by vague formulations such as "malice," and "premeditation."[18] The behavior of juries alone – the *most* visible and

[16] Respondent does emphasize (N.C. Br. 36-37), as we have previously noted (Pet. Br. 63 and *id.* n.97, 77-78 and *id.* n.118) that North Carolina trial judges are not required to submit evidentially unsupported lessers to a jury, and have been admonished by the North Carolina Supreme Court not to do so. Respondent fails to note that trial judges nevertheless *do* do so in some cases, and that the North Carolina Supreme Court has uniformly held that there is no remedy for, or sanction against, the practice. *See* Pet. Br. 77-79.

[17] *See* Pet. Br. 18-23. At Pet. Br. 23 n.25, we noted the enactment of a new North Carolina death penalty statute on April 8, 1974. However, the North Carolina Supreme Court has since held that the 1974 statute is nowise retrospective and has no effect upon death penalties imposed under *Waddell* prior to its enactment. *State v. Williams*, 286 N.C. 422, ____ S.E.2d ____ (1975). *Accord: State v. Avery*, 286 N.C. 459, ____ S.E.2d ____ (1975); *State v. Lampkins*, 286 N.C. 497, ____ S.E.2d ____ (1975).

[18] *Cf. Baggett v. Bullitt*, 377 U.S. 360, 373 (1964): "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."

legally constrained decision-makers in the entire process – plainly exhibits choices to convict alternatively of first degree murder, second degree murder or manslaughter that are inexplicable except as exercises of discretion (*see* Pet. Br. App. C), no "different in kind [or in] . . . degree, from the *discretion*" condemned in *Furman* (N.C. Br. 38) (emphasis in original).[19]

Taking a somewhat different tack, the Government's brief concedes that an array of broadly discretionary

[19] Moreover, recent criminal procedure amendments, effective July 1, 1975, have endorsed the rule of *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974) (described at Pet. Br. 89-94) and insure that the jury will continue to be able to nullify the death penalty in a sympathetic case, since North Carolina now has provided a statutory right of a capital defendant to have his jury instructed as to the consequences of a guilty verdict:

[N.C. Gen. Stat. § 15-176.3 (cum. supp.):]

"Informing and questioning potential jurors on consequences of guilty verdict.–When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime."

[N.C. Gen. Stat. §15-176.4 (cum.supp.):]

"Instruction to jury on consequences of guilty verdict.– When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that the death penalty will be imposed upon the return of a verdict of guilty of that crime."

[N.C. Gen. Stat. §15-176.5 (cum.supp.):]

"Argument to jury on consequences of guilty verdict.– When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

judgments does determine which particular defendants will be sent to death under a purportedly "mandatory" death penalty scheme. (U.S. Br. 55-77). Indeed, the Government's argument that public acceptance of the death penalty is demonstrated by juries' willingness to "assess guilt with knowledge of the potential penalties" (U.S. Br. 30) explicitly recognizes that capital jurors make discretionary sentencing judgments in deciding whether or not to convict of the capital degree of an offense (*see also* U.S. Br. 24, 48-49) – often "under the guise of resolving issues of evidential doubt."[20] The Government responds to this and other aspects of admitted sentencing selectivity in the administration of

[20] KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966), quoted at Pet. Br. 133. The Government's summary of Kalven & Zeisel (U.S. Br. 70-71) overlooks the authors' "basic thesis . . . that the jury by and large responds to the discipline of the evidence, and where it does not, it conceals from itself its own response to sentiment, under the guise of resolving issues of evidential doubt." KALVEN & ZEISEL, *op. cit.*, at 427. It also ignores the authors' conclusion that "techniques for locating a hard core of capital cases do not put to rest the concern about evenhanded justice. In the end the task is one of deciding who, among those convicted of capital crimes, is to die. Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes. The discretionary use of the death penalty requires a decision which no human should be called upon to make." *Id.* at 448-449. The Kalven-Zeisel thesis is dramatically illustrated by *State v. Poole*, ____ N.C. ____, 203 S.E.2d 786 (1974) (in which the Supreme Court of North Carolina held that appellant had been convicted and sentenced to death for first degree burglary on the basis of insufficient evidence) and by the retrial which followed *State v. Spicer*, ____ N.C. ____, 204 S.E.2d 641 (1974), in which a defendant whose conviction and death sentence for first degree murder had been reversed by the Supreme Court of North Carolina on the grounds of procedural error was subsequently acquitted of a charge of first degree murder and set free at a retrial. *State v. Spicer*, New Hanover County Sup. Ct. No. 73-Cr-8034 (Feb. 21, 1975).

a "mandatory" death penalty[21] with two basic arguments.[22] The first is that criminal justice is unavoidably and ineradicably discretionary (U.S. Br. 11-12, 14, 55-60), and that "[i]f a state properly can prescribe the death penalty for at least some crimes, . . . then it is impossible to turn to the Eighth Amendment as a source of a constitutionally-supported principle that this difference in the penalty imposed requires a difference in the process used" (U.S. Br. 57-58). Because the argument either ignores or summarily overrules *Furman* without benefit of explanation, we see no cause to pursue it. The Government's second argument is that, although discretionary, the manifold selective procedures that determine life or death serve "important goals of criminal justice" (U.S. Br. 63), operate fairly and evenhandedly in most cases (*e.g.*, U.S. Br. 70-73), and are subject to legal or constitutional correction independent of the Eighth Amendment when they do not (*e.g.*, U.S. Br. 12-13, 56-59, 64, 67). It is presumably upon this view that the Government can assume the capital trial process works to visit death "on the worst offenders" (U.S. Br. 39), "a few extreme cases" (U.S. Br. 50), or at least "a few 'exemplary' cases" (*ibid.*) chosen non-arbitrarily (*see*

[21] *See, e.g.*, U.S. Br. 75-76: "Those whose execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard have been sent to their death because none of a large number of actors thought they deserved to be spared."

[22] A third recurrent argument in the Government's brief—that "discretion . . . in the criminal justice system . . . reduces the potential punishment a defendant may suffer; it never operates to increase the maximum punishment" (U.S. Br. 66; *see also* U.S. Br. 13)—requires no reply beyond Professor Black's quoted at Pet. Br. 76-77 n.116. *And compare* U.S. Br. 74-75 with Pet. Br. 100.

U.S. Br. 62). Such assumptions are possible only because the argument is made at a level of theoretical abstraction that declines to "specifically address the North Carolina approach . . . or any particular alternative approach" (U.S. Br. 2; *see also id.* at 6). Tested by the facts of any particular capital punishment procedure, the Government's theoretical defense of a discretion-laden death-punishing procedure theoretically subject to "independent remedies" (U.S. Br. 64) against aberrational and arbitrary condemnation falls apart.

The most evident such fact in this case, of course, is petitioner Jesse Thurman Fowler's death sentence for a crime that is altogether indistinguishable from hundreds which result in non-capital manslaughter or second degree murder convictions. The Government is manifestly not disposed to support this result, but suggests no way in which the result or similarly arbitrary results can be controlled without reliance on the Eighth Amendment. The pious pronouncement that "racial or other indivious discrimination occurring . . . at [various] . . . stages of the criminal justice system, is unconstitutional and may be challenged directly" (U.S. Br. 12-13) is simply chimerical in this context.[23] For the vice which

[23] The ineluctable arbitrariness of any system in which men are consigned to die "because none of a large number of actors thought they deserved to be spared" (U.S. Br. 76) can obviously not be controlled by application of the Equal Protection Clause. Both the Government (U.S. Br. 45) and North Carolina (N.C. Br. 47) are quick to call the Court's attention to the particularly ugly crimes involved in a case such as *Jarrett v. North Carolina, pending on petition for certiorari*, No. 73-6877. However, experienced corrections officials have repeatedly pointed out "that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta prisons and I can pick out many prisoners in each institution serving life sentences or less, can prove that their crimes were just as atrocious and sometimes more so, than most of those men on the row." Testimony of Clinton T. Duffy, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the*

(continued)

the Government treats as merely adventitious to the administration of a system of capital punishment is in fact endemic to it (*see* BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974), *passim*; Pet. Br. 136-140; U.S. Br. 55-77).

> ". . . [T]he [death] penalty . . . is not and cannot be administered with even rough equality. . . .
>
> A rigid legislative definition of the cases where the sentence should be death has proved to be unworkable in practice, given the infinite variety of circumstances that attend even the heinous crimes. Therefore, it is inevitable that the jury or the court be given power to decide whether the punishment should be imposed. . . . Discretion means, however, that variations are inevitable, depending on the individuals involved, the jury that may be empanelled, the attitude of the press and public and other accidents of time and place. . . . Yet most dramatically when life is at stake, equality is urged to be a most important element of justice."[24]

(footnote continued from preceding page)

Judiciary, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* 19, 24 (March 20, 21, and July 2, 1968). *See also* Pet. Br. 43 n.64. At the other end of the spectrum, there are cases, such as the killing of her long-time paramour by the 52 year old black woman in *Ward v. North Carolina, pending on petition for certiorari*, No. 74-6263, which it is perfectly obvious–although we know no way to demonstrate it statistically–almost never result in capital verdicts (although this one did). Petitioner Fowler's case is doubtless one in which many prosecutors or juries would conclude that the defendant "deserved to be spared" (U.S. Br. 76), *see* Pet. Br., App. C; but petitioner's prosecutor and jury did not take that view. His death sentence is the arbitrary result of an arbitrary system that is so irregular as to defy control under Equal Protection principles for lack of any pattern from which deviations may be judged.

[24] Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 259 (1961).

This uncontrollable inequality – this sheer arbitrariness – brings the uniquely harsh penalty of death within the central concerns of the Eighth Amendment (*see* Pet. Br. 27-45), as *Furman* held. For surely it is the very essence of a cruel and unusual punishment that such "social tolerance" (U.S. Br. 8) as it enjoys can be purchased only by infrequent, unequal and irregular applications. *See* Appendix B, *infra*, at 8b-15b.

2. The Excessive Cruelty of the Death Penalty.

The principal argument advanced by the respondent and its supporting *amici* against this aspect of our Eighth Amendment contention (Pet. Br. 102-140) is that legislative enactment of death penalty laws demonstrates the acceptability of killing as a punishment under contemporary standards of decency. *See, e.g.*, N.C. Br. 28-29; Cal. Br. 36; U.S. Br. 29-31. We anticipated the argument at Pet. Br. 131-140, and will not impose upon the Court by further elaboration of the distinction recognized in *Furman* between (A) legislative acceptance of a punishment as a regular and usual part of the state's criminal-law machinery and (B) legislative authorization of a punishment to be inflicted in the rare and uncertain cases where it "is not averted by one of [numerous recognized] . . . avenues of discretionary mercy" provided by procedures under which particular defendants "have been sent to their death because none of a large number of actors thought they deserved to be spared" (U.S. Br. 76).

The Government (U.S. Br. 30) and California (Cal. Br. 39) also point to the fact that juries are willing to vote to kill defendants in individual cases, whereas a

truly intolerable punishment would be rejected "by the refusal of juries to convict of crimes carrying the . . . punishment" (U.S. Br. 24). However, there would be no purpose to a constitutional guarantee forbidding only Cruel and Unusual Punishments which no jury will permit to be imposed upon any defendant; and the argument that sometimes capital crimes are prosecuted to a death verdict (and, more rarely, to an execution) ignores the far more striking fact that this outcome is uniformly rejected except for a "bare sample of the ["literally thousands"] of culprits whose conduct makes them eligible for [it]."[25]

> "The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence."[26]

Such infrequency and reluctance make "aberrational" (U.S. Br. 24) the cases in which juries *are* willing to see the defendant suffer death.[27] And an extreme penalty

[25] Professor Herbert Wechsler, quoted at Pet. Br. 134. It should be noted that Professor Wechsler is speaking in 1961 of the death penalty at a time (1930-1959) when it was used far more frequently ("with executions ranging from 199 to 48," *ibid.*) than it has been used in later years.

[26] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

[27] The Government suggests that punishments imposed by "administrative officials" are peculiarly subject to Eighth Amendment review because "[t]he smaller the decision-making body, the more likely it is to err in its reading of the demands of the social mores and the less likely the penalty will be brought to public attention for correction" (U.S. 28). The Government does not apply this analysis, however, to the verdicts of particular juries which vote to impose a death sentence in cases where other juries would not (*see* Pet. Br., App. C), or to a system of administering the death penalty in which its infliction rests upon such verdicts.

that is repudiated save in aberrational cases is the very definition of a cruel and unusual punishment.

For the rest, the responding briefs repeat the several justifications which have unvaryingly been advanced to support the death penalty and were previously advanced to sustain live disembowelment and other torturous means of inflicting death. The "moral reinforcement" argument – whether cast in terms of an "expression of moral outrage" (U.S. Br. 39) or " 'public rituals' " (U.S. Br. 40) – persists with a characteristic lack of explanation in treating criminal convictions followed by severe punishments like life imprisonment as tending to " 'forgive the wrongdoer [so as to] . . . end by condoning the crime' " (U.S. Br. 42). *See* Cal. Br. 24-25; U.S. Br. 39-44.[28] The "incapacitation" argument characteristically jumps from an assertion of the homicidal dangerousness of "certain offenders" (U.S. Br. 45) to the assertion that "[t]hese individuals can be detected" (*ibid.*), without mention of the fact that neither North Carolina law nor any other extant American death penalty law undertakes to detect them, even if they *were* detectable.[29] *See* Cal. Br. 28-29; U.S. Br. 44-46. The "deterrance" argument characteristically

[28] *Cf.* Lord Chancellor Gardiner, in 268 HANSARD, PARLIAMENTARY DEBATES (5th series) 703 (Lords, 43rd Parl., 1st Sess., 1964-1965) (1965): "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect."

[29] For a detailed discussion of this problem, see *Furman v. Georgia*, 408 U.S. 238, 356-357 (1972) (concurring opinion of Mr. Justice Marshall).

invokes the common intuition of the persons making the argument and those to whom it is addressed that *we* would be deterred from crime by the threat of death, as though *we* were the sorts of persons who would commit violent crimes if not deterred from doing so by fears of execution. *See* Cal. Br. 29-31; U.S. Br. 32-35. Evidence of the deterrent efficacy of the death penalty is found in the "dramatic increases in murders" (Cal. Br. 26) during the past decade (*see* N.C. Br. 41 n.55; Cal. Br. 26-27), without mention of the fact that murder has shown by far the *lowest* rate of increase of all major crimes during this period[30] – a fact hardly conducive of the conclusion that the rate of crimes supposed to be deterred by capital punishment has risen disproportionately to other crimes as "the annual number of executions in the United States dwindled to nothing" (Cal. Br. 26). The Government's "sophisticated regression analysis" (U.S. Br. 9), once *it* has been analyzed, turns out to contain the same simple error,

[30] The 1973 Uniform Crime Reports–the latest that we have found available–show the following percent changes from 1960 to 1973 in (A) number of offenses, and (B) rate per 100,000 inhabitants, for the seven major crimes:

	(A) Percent increase in number of offenses	(B) Percent increase in rate per 100,000 inhabitants
Murder and non-negligent manslaughter	115.6	86.0
Forcible rape	199.2	155.8
Robbery	256.3	204.5
Aggravated Assault	172.6	132.9
Burglary	181.3	140.3
Larceny	134.3	100.3
Auto theft	183.0	141.8

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES–1973, table 2 (Sept. 6, 1974) at 59.

among numerous others.[31] With the utmost deference, we find nothing in the justifications offered for the death penalty by respondent or its supporting *amici*

[31] Because the Government has lodged with the Court an unpublished manuscript entitled "The Deterrent Effect of Capital Punishment: A Question of Life or Death" (National Bureau of Economic Research Working Paper No. 18, November 1973) written by Isaac Ehrlich, and because the recondite form of that paper entails the danger that its unintelligibility will obscure its insignificance, we attach a brief analysis of it as Appendix C, *infra*. *See also* Appendix E. We find it particularly surprising that the Government sees the value of the paper in its supposed attempt to "hold constant factors other than the death penalty that might influence the rate of murders" (U.S. Br. 37; *see also id.* at 38), since Ehrlich has (A) chosen a method of mathematical analysis that is peculiarly sensitive to the effect of omitting critical variables, and (B) proceeded to omit numerous critical variables (including one that his own earlier work concluded was critical, *see* Appendix C, *infra* at 12c-13c) while seizing upon only those variables which work to convert an initial finding of *positive* correlation between "the reported murder rate and estimates of the objective risk of execution given conviction of murder" (Ehrlich manuscript, *supra*, at 32) into a negative correlation. For present purposes, however, it is sufficient to note that Ehrlich's ultimate negative correlation (even if one ignores all of the other defects of his methodology) depends exclusively upon the effect of the period of the 1960's; and that he singularly fails to control for factors that produced a general rise in the crime rate–a rise that is higher than the rise in the capital crime rate, *see* note 27 *supra*–during this latter period.

that warrant our expanding upon our previous discussion of the subject at Pet. Br. 121-130 and App. E at 1e-10e.

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APPENDIX A

Capital Punishment Statutes Enacted Since *Furman v. Georgia.*

VIRGINIA

Virginia provides the death penalty for some cases of "capital murder." "Capital murder" is defined and classified as a "class 1 felony" by Va. Code §18.2-31 (1975 Virginia Laws, c. 14 (Feb. 14, 1975):

> "(a) the wilful, deliberate and premeditated killing of any person in the commission of abduction, as defined in §18.2-48,[1] when such abduction was committed with the intent to extort money, or a pecuniary benefit;
>
> (b) the wilful, deliberate and premeditated killing of a human being by another for hire; and

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[1] Virginia Code §18.2-48 (1975 Virginia Laws, c. 14 (Feb. 14, 1975)) provides:

> "Abduction with intent to extort money or for immoral purpose.—Abduction with the intent to extort money, or pecuniary benefit, abduction of any person with intent to defile such person, and abduction of any female under sixteen years of age for the purpose of concubinage or prostitution, shall be a class 2 felony."

Virginia Code §18.2-47 (1975 Virginia Laws, c. 14 (Feb. 14, 1975)) provides:

> "Abduction and kidnapping; defined and punishment.—Any person, who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes the person of another, with the intent to deprive such other person of his personal liberty, or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of 'abduction'; but the provisions of this section shall not apply to any law enforcement officer in the performance of his duty. The terms 'abduction' and 'kidnapping' shall be synonymous in this Code."

(c) the wilful, deliberate and premeditated killing by an inmate in a penal institution as defined in §53-19.18,[2] or while in the custody of an employee thereof."

Virginia Code §18.2-10 (1975 Virginia Laws, c. 14 (Feb. 14, 1975)) provides that the authorized punishment for conviction of a class 1 felony is death. No new capital procedure is provided.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

These statutes become effective on October 1, 1975.

[2] Virginia Code §53-19.18 (1974) defines "penal institution" as "every prison, prison camp, prison farm or correctional field unit . . . and every jail, jail farm, lockup or other place of detention . . , [but not including] any industrial school or other institution established solely for the detention of juvenile delinquents."

APPENDIX B

Brief for Petitioner, *Aikens v. California*, 406 U.S. 813 (1972) [No. 68-5027] at 13-27.

* * * * *

whether death is a cruel and unusual punishment within the meaning of the Constitution of a Nation which aspires to be one of the world's more enlightened peoples.

But our approach to the Eighth Amendment concentrates primarily upon the evolution of the death penalty in the United States itself. Properly viewed, that evolution has brought this country to a stage at which the relevant constitutional indicators of a cruel and unusual punishment have abundantly matured. America has had its time of "experimentation"[23] with the killing of men; the experiment has led to one inexorable conclusion; and further development can only make more manifest—at a terrible cost—what is already manifest and manifestly fitting as a basis for judicial application of the Constitution. To demonstrate why this is so, we first discuss the

* * * * * *

Iran, Mali, Mexico (29 of whose 32 jurisdictions have legally abolished the death penalty), Nicaragua, Pakistan, Sierra Leone, Sudan and the Republic of Viet Nam. These latter countries would therefore have to account for more than a quarter of the executions in the non-communist world in order to bring the non-communist total, exclusive of the United States, to 660 according to Patrick's figures. And Patrick's figures appear to be unduly high. See note 51, *infra*.

[23] See *Powell v. Texas*, 392 U.S. 514, 536-537 (1968) (plurality opinion of Mr. Justice Marshall); *Williams v. Florida*, 399 U.S. 78, 138 (1970) (separate opinion of Mr. Justice Harlan).

nature of the Eighth Amendment's concern against cruel and unusual punishments, and then proceed to test the death penalty in light of that concern.

II.

THE RELEVANT EIGHTH AMENDMENT STANDARD.

At the heart of the Eighth Amendment[24] lurks an extraordinary dilemma whose resolution is, we think, the key to decision of this case. The dilemma arises from the confrontation of three basic principles.

[24] The Cruel and Unusual Punishment Clause of the Eighth Amendment is made applicable to the States through the Due Process Clause of the Fourteenth. *Robinson v. California*, 370 U.S. 660 (1962), so holds; and there can be little doubt that this Bill of Rights guarantee, whose "basic concept . . . is nothing less than the dignity of man," *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren), satisfies the most restrictive test for adoption as a measure of due process. Its derivation from times anterior to Magna Carta (see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 845-846 (1969)) through the Bill of Rights of 1689 (1 Wm. & Mary, sess. 2, ch. 2, preamble, clause 10) amply establishes that it is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut*, 302 U.S. 319; 325 (1937). The point did not escape Patrick Henry in 1788. "What has distinguished our ancestors?–That they would not admit of tortures, or cruel and barbarous punishment." 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1863), 447.

For convenience, we shall speak simply of the Eighth Amendment throughout this brief, meaning thereby the Cruel and Unusual Punishment Clause as it measures the liberty protected by the Due Process Clause of the Fourteenth Amendment.

First, in the context of American government, the Eighth Amendment's proscription of cruel and unusual punishments forbids the legislative enactment of such punishments as well as the judicial imposition of them. This has always been accepted. *Weems v. United States*, 217 U.S. 349, 366, 378-379, 382 (1910); *Trop v. Dulles*, 356 U.S. 86, 103-104 (1958) (plurality opinion of Chief Justice Warren); *Robinson v. California*, 370 U.S. 660 (1962); and see *Wilkerson v. Utah*, 99 U.S. 130, 133, 136-137 (1879) (dictum); *In re Kemmler*, 136 U.S. 436, 446-447 (1890) (dictum).

Second, the force of the Amendment is not limited to the prohibition of those atrocities that would have turned the stomachs of the Framers in the Eighteenth Century.[25] This conclusion is compelled by both author-

[25] Certainly the Eighth Amendment does bar those atrocities, but they mark only the core of minimum content of its prohibition. This is what was meant in *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879), by the observation that, although the exact extent of the Cruel and Unusual Punishment Clause is difficult of definition, "it is safe to affirm that punishments of torture . . . , and all others in the same line of unnecessary cruelty, are forbidden." *Wilkerson* does not suggest, as the *Weems* dissent seems to imply, that torture is the outer limit of the Amendment. *Weems v. United States*, 217 U.S. 349, 400-401 (1910) (Mr. Justice White, dissenting). Nor could the Amendment be so limited for the reasons stated convincingly by the majority in *Weems:*

> ". . . [S]urely [the Framers] . . . intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. . . . [I]f we are to attribute an intelligent providence to [the Eighth Amendment's] . . . advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked." (*Id.* at 372-373.)

ity and reason. "[I]t is a constitution we are expounding,"[26] and the Constitution "states or ought to state not rules for the passing hour, but principles for an expanding future."[27] Thus, *Trop v. Dulles*, 356 U.S. 86 (1958), outlawed the hoary penalty of banishment with the observations that the scope of the Cruel and Unusual Punishment Clause "is not static," and that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Id.*, at 101 (plurality opinion of Chief Justice Warren).) See also *Robinson v. California*, 370 U.S. 660, 666 (1962) (referring to "the light of contemporary human knowledge"); *Jackson v. Bishop*, 404 F.2d 571, 578-580 (8th Cir. 1968); *Goss v. Bomar*, 337 F.2d 341, 342-343 (6th Cir. 1964) (*dictum*). Such a conception of evolving standards is a constitutional commonplace,[28] and is

[26] *M'Culloch v. Maryland*, 4 Wheat. 316, 407 (1819).

[27] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), 83.

[28] E.g., *Brown v. Board of Education*, 347 U.S. 483, 492-493 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted. . . ."); *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885) ("What punishments shall be considered as infamous [for purposes of the Fifth Amendment's indictment requirement] may be affected by the changes of public opinion from one age to another.") Reference was made to *Wilson* and to *Mackin v. United States*, 117 U.S. 348, 351 (1886), in *Weems v. United States*, 217 U.S. 349, 378 (1910), which canvassed the subject in this frequently quoted passage:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil has theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing

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firmly entrenched in the jurisprudence of the Eighth Amendment in particular. The Cruel and Unusual Punishment Clause "may be therefore progressive, and is not

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> occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. There is an example of this in *Cummings v. State of Missouri*, 4 Wall. 277, where the prohibition against *ex post facto* laws was given a more extensive application than what a minority of this court thought had been given in *Calder v. Bull*, 3 Dall. 386. See also *Ex parte Garland*, 4 Wall. 333. The construction of the 14th Amendment is also an example, for it is one of the limitations of the Constitution. In a not unthoughtful opinion Mr. Justice Miller expressed great doubt whether that Amendment would ever be held as being directed against any action of a State which did not discriminate 'against the negroes as a class, or on account of their race.' *Slaughterhouse Cases*, 16 Wall. 36, 81. To what extent the Amendment has expanded beyond that limitation need not be instanced.
>
> "There are many illustrations of resistance to narrow constructions of the grants of power to the National Government. One only need be noticed, and we select it because it was made against a power which more than any other is kept present to our minds in visible and effective action. We mean the power over interstate commerce. This power was deduced from the eleven simple words, 'to regulate commerce with foreign nations and among the several States.' The judgment which established it was pronounced by Chief Justice Marshall (*Gibbons v. Ogden*), and reversed a judgment of Chancellor Kent, justified, as that celebrated jurist supposed, by a legislative practice of fourteen years and fortified by the opinions of men familiar with the discussions which had attended the adoption of the Constitution. Persuaded by such

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fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910).

To deny this dynamic character to the Eighth Amendment would produce inconceivable results. Appendix C to this brief sets forth some of the punishments legally in force and commonly in use in this country during the period when the Cruel and Unusual Punishment Clause was written and adopted. If 1791 is indeed the constitutional benchmark and if the Constitution does not forbid capital punishment today upon the theory that it was widely allowed by law and practice in 1791, then the Eighth Amendment also does not forbid today—and will never forbid—the stocks and the pillory, public flogging, lashing and whipping on the bare body,[29] branding of

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considerations the learned chancellor confidently decided that the Congressional power related to 'external, not to internal, commerce,' and adjudged that under an act of the State of New York, Livingston and Fulton had the exclusive right of using steamboats upon all of the navigable waters of the State. The strength of the reasoning was not underrated. It was supported, it was said, 'by great names, by names which have all the titles to consideration that virtue, intelligence and office can bestow.' The narrow construction, however, did not prevail, and the propriety of the arguments upon which it was based was questioned. It was said, in effect, that they supported a construction which 'would cripple the government and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent'...." (*Id.* at 373-375.)

[29] Whipping was not thought to be a particularly serious punishment in the late eighteenth century. "[B]y the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Act of September 24, 1789, chap. 20, §9, 1 Stat. at L., 77." *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885).

cheeks and forehead with a hot iron, and the slitting, cropping, nailing and cutting off of ears. Further discussion of a "static" theory of the Eighth Amendment seems unnecessary.[30]

Third, in applying the Eighth Amendment to advancing and changing times, the courts are to be guided by the touchstone of "contemporary human knowledge,"[31] "public opinion ... enlightened by a humane justice,"[32] and "the evolving standards of decency that mark the progress of a maturing society."[33] What other standards, after all, could possibly be used? Surely it was not the purpose of the Eighth Amendment that succeeding generations of judges should mirror in it their own, individual philosophies of the criminal sanction. So, if the obsolete and eldritch customs of 1791 are not to be perpetually controlling, where else may judges look but to enlightened public opinion for conception of the "cruel and unusual punishments" which the Constitution forbids?

And there stands the dilemma. Quite perceptibly, an extreme difficulty must attend any process of constitutional adjudication by which this Court subjects legislation to the test of "enlightened public opinion," and

[30] The argument has sometimes been advanced that the Eighth Amendment cannot forbid capital punishment consistently with the indictment clause of the Fifth, which speaks of (and, so the argument goes, constitutionalizes) "capital ... crime." This reasoning, like the static theory of the Eighth Amendment generally, proves too much. For the double jeopardy clause of the constitution also speaks of "jeopardy of life *or limb*." (Emphasis added.)

[31] *Robinson v. California*, 370 U.S. 660, 666 (1962).

[32] *Weems v. United States*, 217 U.S. 349, 378 (1910).

[33] *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

adjudges the validity of a legislature's product according to society's "standards of decency." For, both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency. If the question asked by the Eighth Amendment really be whether our democratic society can tolerate the existence of any particular penal law that is on the books, the Eighth Amendment's answer will always be that it can—and for the simple reason that the law is on the books of a democratic society.[34] The conclusion therefore seems to be required either that the Eighth Amendment is *not* a judicially enforceable restriction upon legislation;[35] or that the *Weems-Trop* test referring to contemporary public standards of decency is not a usable measure of the Amendment; or else that the question which we have just posed is not the proper question to which the Amendment and the *Weems-Trop* test respond.

As this way of putting the matter suggests, we think that the question—whether the maintenance of a particular harsh penalty on the statute books is consistent with prevailing standards of decency—is the wrong

[34] Mr. Justice Story therefore wrote that the Eighth Amendment "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct" as the Amendment forbids. 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed. 1873), 623. This observation has undoubted merit with regard to penal laws that are generally and uniformly enforced, but it is inapplicable to selectively and rarely enforced punishments. Precisely in regard to such "cruel *and unusual* punishments," the Amendment is most necessary.

[35] *See State v. Cannon*, 55 Del. 585, 190 A.2d 514 (1963), sustaining the punishment of whipping in an opinion which effectively denies any judicial review of legislation under the Cruel and Unusual Punishment Clause.

question. We suggest what we think is the right one below. For we cannot believe that the Eighth Amendment is not a restriction upon cruel and unusual penal legislation rightly enforceable by this Court. Nor can we believe that the Amendment's prohibition is restricted to live disembowelment and similar long-gone butcheries—nor, on the other hand, that it invokes the unassisted penological impressions of particular Justices. The *Weems-Trop* test *is*, we submit, the proper one. Common standards of decency in our contemporary society *do* set the limits of punishment allowable under the Eighth Amendment. The problem is how those standards are to be ascertained, and with regard to what specific question.

We begin with the specific question. When a man such as Earnest Aikens comes before the court claiming that the law under which he was sentenced provides for an unconstitutional cruel and unusual punishment, the question is not: will contemporary standards of decency allow the existence of such a general law on the books? The question is, rather: will contemporary standards of decency allow the general application of the law's penalty *in fact*? The distinction which we draw here lies between what public conscience will allow the law to *say* and what it will allow the law to *do*—between what public decency will permit a penal statute to threaten and what it will allow the law to carry out—between what common revulsion will forbid a government to put upon its statute books as the extreme, dire terror of the State (not to be ordinarily, regularly or in other than a few rare cases enforced), and what public revulsion would forbid a government to do to its citizens if the penalty of the law were generally, even-handedly, non-arbitrarily enforced in all of the cases to which it applied.

This last point—regarding general, even-handed, non-arbitrary application—is critical. For in it lies, we think, a

large part of the need to have a Cruel and Unusual Punishment Clause in the Constitution, and of the need to have courts enforce it. The government envisaged for this country by the Constitution is a democratic one, and in a democracy there is little reason to fear that penal laws will be placed upon the books which, in their general application, would affront the public conscience. The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities, whose numbers are so few, whose plight so invisible, and whose persons so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.[36]

[36] A recent detailed analysis of the historical origins of the cruel and unusual punishment clause of the Eighth Amendment demonstrates that the provision of the English Bill of Rights of 1689 from which the Eighth Amendment's language was taken *verbatim* was concerned primarily with the irregular, selective application of harsh (but not intrinsically barbaric) punishments; and that its cardinal aim was to forbid the oppressive exercises of a legally unregulated power to mete out severe punishments arbitrarily. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). To be sure, Granucci also finds that the American Framers imperfectly understood the English background of the Cruel and Unusual Punishment Clause, and that they were themselves principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to wholly alter the meaning of the guarantee which they found in their English traditions, or to reject protections of the citizen long preserved by their English heritage.

The debates in Congress and in the ratifying conventions concerning the Eighth Amendment are set forth in Appendix D to this brief. Discussion of the Cruel and Unusual Punishment Clause was notably brief; and only one or two of those who voted for it spoke. What they said unquestionably sustains the view that they meant to *include* in the guarantee a proscription of inherently barbarous penalties. It does not sustain the view

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Herein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation that the Eighth Amendment imposes upon it to respond *rationally* to public conscience. A legislator may not scruple to put a law on the books (still less, to maintain an old law on the books) whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily. But a court cannot sustain such a law under the Eighth Amendment. It cannot do so because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the devices of arbitrariness and irregularity, even as a sop to public conscience.

To put the matter another way, there is nothing in the political process by which public opinion manifests itself in legislated laws that protects the isolated individual from being cruelly treated by the state. Public conscience often will support laws enabling him to be so mistreated, provided that arbitrary selection can be made in such a

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that they meant to jettison other restrictions upon punishment which were encompassed by the language that they took as embodying the basic rights of the citizen evolved through the course of English history. To the contrary, it is apparent that the principal motive force behind inclusion of the Eighth Amendment in the Constitution was the relatively simple and imprecise notion that its guarantees had always been recognized as restrictions upon English government, and that the new national government established by the Constitution and given considerable powers over individuals could not safely be unleashed from the same safeguards.

fashion as to keep his numbers small and the horror of his condition mute.[37] Legislators neither must nor do take

[37] William Forsyth wrote:

> "... When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom, that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. This was strongly exemplified in the case of prosecutions for the forgery of bank-notes, when it was a capital felony. It was in vain that the charge was proved. Juries would not condemn men to the gallows for an offense of which the punishment was out of all proportion to the crime; and as they could not mitigate the sentence they brought in verdicts of Not Guilty. The consequence was, that the law was changed; and when secondary punishments were substituted for the penalty of death, a forger had no better chance of an acquittal than any other criminal. Thus it is that the power which juries possess of refusing to put the law in force has, in the words of Lord John Russell, 'been the cause of amending many bad laws which the judges would have administered with professional bigotry, and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, can not long prevail in England.'"

FORSYTH, HISTORY OF TRIAL BY JURY (2d ed. 1878), 367-368. However, as this Court recognized in *McGautha v. California*, 402 U.S. 183 (1971) the American Legislative response to "the problem of jury nullification" in capital cases was to substitute discretionary for mandatory capital sentencing provisions. In this way, laws which might be "totally repugnant to the feelings of the community" as applied to the generality of cases could nevertheless be preserved for sporadic application, free of the pressures of either jury nullification or public pressure on the legislature.

account of such individuals.[38] But it is the precise business of courts to take account of them, and to disallow under the Eighth Amendment the application to them of penalties so harsh that public conscience would be appalled by their less arbitrary application.[39]

We shall develop this theme more fully, in the pages that follow, with regard to the death penalty. But we have said enough, at this point, to enable us to state our major submission on behalf of Earnest Aikens. His sentence of death for the crime of first-degree murder is an unconstitutional cruel and unusual punishment because it affronts contemporary standards of decency, universally felt, that would condemn the use of death as a penalty for that crime if such a penalty were uniformly, regularly, and even-handedly applied either to all first-

[38] See *Ralph v. Warden*, 438 F.2d 786, 792 (4th Cir. 1970):

> "Although the legislature has the responsibility of establishing criminal penalties, subject only to constitutional limitations, popular acceptance or rejection of capital punishment is reflected by the incidence of actual executions. When the death penalty for rape is exacted with the infrequency that the statistics disclose, there is little pressure for amendment. Public awareness diminishes as the frequency of imposing the penalty decreases, and legislative action is not likely to be prompted when the consequences befall only a few prisoners. For purposes of ascertaining evolving standards, the retention of the death penalty for rape in the codes of some states is less significant than its steady fall into disuse and the present moratorium on executions."

[39] A somewhat similar analysis leads Goldberg and Dershowitz to the conclusion that "A penalty ... should be considered 'unusually' imposed [in the sense of the Eighth Amendment] if it is administered arbitrarily or discriminatorily." Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970).

degree murderers or to any reasonable proportion of those eligible for the penalty under California law.[40]

We use the term "reasonable proportion" in order to exclude the sort of tolerance which a law may obtain through rare—or, in the constitutional sense, "unusual"[41]—application. We do so for the reasons which we

[40] In saying this, we do not ignore the aggravating features of Earnest Aikens' own case. Those features are immaterial for present purposes, because under California law Aikens' sentence of death need not, and does not, depend upon them. Cases presenting the same or worse features might result in a life sentence; cases presenting strongly mitigating circumstances might draw down a death verdict. It is meaningless to ask how enlightened public opinion would react to any particular case. The relevant Eighth Amendment touchstone is the judgment of enlightened public opinion upon the use of the penalty prescribed for the crime defined by law.

[41] "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See *Weems v. United States,* . . . ; *O'Neil v. Vermont,* . . . ; *Wilkerson v. Utah,* . . . These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.' But cf. *In re Kemmler,* . . . ; *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 430 (Brandeis, J., dissenting). If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." *Trop v. Dulles*, 356 U.S. 86, 100-101 n.32 (1958) (plurality opinion of Chief Justice Warren). We think that the constitutional word "unusual" does have some meaning, see note 36, *supra*; and that in determining whether a particular punishment is "unusual" or "different from that which is generally done," it is necessary to look to the actual infliction of the punishment, not its mere statutory authorization. See *Ralph v. Warden*, 438 F.2d 786, 792, (4th Cir. 1970), quoted in note 38, *supra; O'Neil v. Vermont*, 144 U.S. 323, 337, 338 (1892) (Mr. Justice Field, dissenting). *Cf. Wilkerson v. Utah*, 99 U.S. 130, 135 (1879), which, after recounting Blackstone's enumeration of the methods of execution authorized by English law (*i.e.*, live disembowelment,

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have just stated: that is, because we believe that the Cruel and Unusual Punishment Clause is designed precisely to condemn any penalty so oppressive that it can command public acceptance only by virtue of extremely infrequent and sporadic enforcement. Laws are written to be enforced with practicable generality in the cases to which they apply; and so it is a fair measure of a law's acceptability to imagine its general enforcement. Let us do so with regard to capital punishment for first-degree murder.

Let us take a very modest standard of generality and assume that the United States were to execute 184 first-degree murderers this year. We have chosen that figure—in the absence of any obtainable information concerning the number of first-degree murder convictions annually[42]—because it represents the largest number of murderers executed in the country since reliable counts began to be kept in 1930. During the year 1935, 184 men and women were put to death for murder in the United States.[43] Of course, it is absurd to suppose that as few first-degree murder convictions are returned yearly in the 1970's as in the 1930's; and even in the 1930's such knowledgeable observers as Warden Lewis E. Lawes of Sing Sing recognized that the death penalty was not being generally enforced.[44] Nonetheless, let us take the 1935

beheading and quartering), adds: "History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect."

[42] See Appendix F *infra.* And see Bedau, *Volume and Rate of Capital Crimes*, in BEDAU, THE DEATH PENALTY IN AMERICA (Rev. ed. 1967) [hereafter cited as BEDAU], 56-74.

[43] UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No.45, *Capital Punishment 1930-1968* (August 1969) [hereafter cited as NPS (1968)], p. 7.

[44] LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 306-307, quoted at note 96, *infra.*

national high-water mark of 184 first degree murderers as a measure of some generality of enforcement of the death penalty for murder.

Imagine now 184 electrocutions and gassings in the United States in 1971. That is four times the number of human beings executed during any of the past ten years, and exceeds by 50 the total number of executions for the ten-year period.[45] If, in fact, 184 murderers were to be executed in this year 1971, we submit it is palpable that the public conscience of the Nation would be profoundly and fundamentally revolted, and that the death penalty for murder would be abolished forthwith as the atavistic horror that it is. Our detailed reasons for this submission follow. First, we pause for one additional paragraph to make our legal point clear.

We disagree not at all with the reasoning process, but we dispute the factual premise—unexamined then and now demonstrably incorrect—of the *dictum* announced by this Court thirteen years ago in *Trop v. Dulles*, 356 U.S. 86 (1958):

> ". . . Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted*, it cannot be said to violate the constitutional concept of cruelty." (*Id.* at 99 (plurality opinion of Chief Justice Warren; emphasis added).)

We think that it is simply not correct that the death penalty is today "still widely accepted." We speak, for the reasons that we have already stated, not of its acceptance on the pages of the statute books, but of its

[45] See p. 37, *infra.*

acceptance in actual usage—and of such acceptance as it does not illegitimately obtain by being irregularly and arbitrarily applied. Far from being "widely accepted," the death penalty today is with rare public unanimity rejected and repudiated. We proceed next to demonstrate this point and to develop its constitutional implications.

III.

THE PENALTY OF DEATH

The acceptance which a punishment is given by contemporary society, and its acceptability under that society's prevailing standards of decency, may be measured by objective indicators. In the case of the death penalty today, numerous indicators point in a single direction. Language requires that we state them one by one; but it is their plain convergence that, we think, marks the punishment of death as unacceptable, cruel and unusual.

(1) All informed observers of the death penalty agree in describing a world-wide trend toward its disuse that is nothing short of drastic.[46] This has been a relatively constant long-

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[46] UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereafter cited as UNITED NATIONS] 81-82, 96-97, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) (February 23, 1971), pp. 3, 10; SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) [hereafter cited as SELLIN (1959)], 4-14; Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, (1967), 239-240; MATTICK, THE UNEXAMINED DEATH (1966) [hereafter cited as MATTICK], 5-6, WEIHOFEN, THE URGE TO PUNISH (1956) [hereafter cited as WEIHOFEN], 163-164; OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT (1961), 16-30; Barry, *Hanged by the Neck Until . . .*, 2 SYDNEY L. REV. 401, 411 (1958);

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APPENDIX C

Analysis of Ehrlich Manuscript

On March 7, 1975, the Solicitor General of the United States lodged with the Court an unpublished manuscript by Isaac Ehrlich entitled "The Deterrent Effect of Capital Punishment: A Question of Life and Death" (National Bureau of Economic Research Working Paper No. 18, November 1973).[1] The author of this paper uses the statistical technique of linear regression analysis in an attempt to demonstrate that the threat of execution had a deterrent effect on the homocide rate in the United States between 1935 and 1969. His conclusion is that each additional execution during the period might "have deterred approximately eight murders." (U.S. Br. 35).

Linear regression analysis[2] is commonly employed by social scientists to examine hypothesized relationships

[1] The cover of this paper bore the inscription "NBER working papers are distributed informally and in limited number for comments only. They should not be quoted without written permission. This report has not undergone the review accorded official NBER publications; in particular, it has not yet been submitted for approval by the Board of Directors." In a March 27, 1975, letter responding to an inquiry from petitioner's counsel, National Bureau of Economics Research President John R. Meyer explained further that "The working paper in question has not been approved for National Bureau publication nor has it been submitted for approval.... It was not available to interested members of the public. A very limited number was circulated to interested scholars.... The NBER will not be publishing a paper on this subject in June 1975 nor is it considering publication at this time." (The full text of this letter is attached as Appendix D.) This NBER working paper will be referred to hereinafter as EHRLICH.

[2] For fuller explanation of this technique, *see* ANDERSON, INTRODUCTION TO MULTIVARIATE STATISTICAL ANALYSIS (1958); EATON, MULTIVARIATE STATISTICAL ANALYSIS (1972); KSHIRSAGAR, MULTIVARIATE ANALYSIS (1972).

between variables (*e.g.*, the effect of cholesterol levels upon heart attacks, of a particular nutrient upon plant growth, of tax rates upon business investment). However, regression analysis is an exceptionally brittle tool of limited usefulness[3] if conditions make it impossible to validate regression results with controlled experimentation:

> "[i]n most circumstances, . . . any indications produced by a multiple regression analysis of observational data are merely a good hint to try for confirmation by a proper experiment. In a true experiment the independent variables will be properly randomized with a table of random numbers and will have low correlations differing from zero by only random fluctuation, or else in a completely balanced experiment the correlations will be exactly zero.
>
> The justification sometimes advanced that a multiple regression analysis on observational data can be relied upon if there is an adequate theoretical background is utterly specious and disregards the unlimited capability of the human intellect for producing plausible explanations by the carload lot."[4]

Regression analysis without controlled experimentation is especially dangerous when applied to phenomena affected by numerous variables because of the extraordinary sensitivity of the technique to omission of variable or misspecification of the mathematical form of relevant variables and its limited ability to reveal causal

[3] *See, e.g.*, Campbell & Erlebacher, *How Regression Artifacts in Quasi-Experimental Evaluations Can Mistakenly Make Compensatory Education Look Harmful*, in 3 HELLMUTH, COMPENSATORY EDUCATION: A NATIONAL DEBATE 185-209 (1970).

[4] BROWNLEE, STATISTICAL THEORY AND METHODOLOGY IN SCIENCE AND ENGINEERING 455-456 (2 ed. 1965).

relationships among included variables. Furthermore, when the observed data constitute time series, spurious relationships are particularly likely to appear.[5] For all these reasons, it is necessary to use the utmost care in deriving policy implications from multivariate analysis: "multiple linear regression techniques . . . can be very useful but also very dangerous if improperly used and interpreted. . . . [The results are] easily misused and misunderstood."[6]

Although the mathematical analysis in the Ehrlich manuscript is technical, the basic demonstration undertaken is relatively simple. Ehrlich attempts to use regression analysis to estimate the effect of one variable—the execution rate—upon the rate of murders, while controlling for the effects of seven other variables which he posits will also have an impact on the number of murders. He begins with the "basic proposition" that "the propensity to perpetrate . . . [capital] crimes is influenced by the prospect of gains and losses associated with their commission." EHRLICH 5.[7] Assuming that the murder rate is a function of eight independent variables—probability of arrest (Pa); probability of conviction given arrest ($P_{c|a}$); probability of execution given conviction ($P_{e|c}$); national aggregate measures of the percentage of the population between age 14 and 24 (A); unemployment (U); labor force participation (L); permanent income (Y_p); and chronological time (T)—Ehrlich further assumes that the murder rate may be expressed in exponential form by the following equation:[8]

[5] SNEDECOR & COCHRAN, STATISTICAL METHODS 189 (6th ed. 1968); Yule, *Why Do We Sometimes Get Nonsense-Correlations Between Time-Series? A Study in Sampling and the Nature of Time*, 89 J. ROYAL STATIS. SOC. 1-69 (1926).

[6] DRAPER & SMITH, APPLIED REGRESSION ANALYSIS 234-236 (1966).

[7] Ehrlich further posits that "[t]here is no *a priori* reason to expect those who hate, or, for that matter, those who love other persons to be less responsive to change in costs and gains associated with activities they may wish to pursue in accordance with their preferences than persons who are indifferent toward the well-beings of others," EHRLICH 6; that the death penalty constitutes for the average potential criminal a more severe form of punishment than life imprisonment, *id.* at 8; and that "a necessary and sufficient condition for murder to occur" is that a potential murder's "expected utility from crime exceed his expected utility from an alternative (second best) action," *id.* at 7.

$$\text{murder rate} = K P_a^{\alpha_1} P_{c|a}^{\alpha_2} P_{e|c}^{\alpha_3} U^{\beta_1} L^{\beta_2} Y_p^{\beta_3} A^{\beta_4} T^{\beta_5} (\exp)^v$$

In other words, he assumes that the murder rate is a function of these particular eight variables in the particular relationship to each other and to murder that his mathematical equation expresses. He reports results using the logarithmic rather than the natural values of his variables. After estimating values of the three deterrence variables, P_a, $P_{c|a}$, $P_{e|c}$, he uses a computer computational technique to select coefficients for the independent variables which fit his particular equation to the data. He derives several negative coefficients of $P_{e|c}$ over the period 1935-1969 and concludes that each additional execution during this period would have prevented "7 or 8," EHRLICH 42, "30," *id.* at 43, "32," *ibid.*, "1 to [sic] 17," *ibid.*, or "between the limits of 0 and 24," *ibid.*, murders.

Although the Government's brief asserts that "this study at the least indicates that there is important empirical support for the *a priori* logical belief that the

[8] In this equation, the term "(exp)" denotes the base of natural logarithms and "v" denotes a random error variable with zero mean and a finite variance. In the regression, the natural logarithm of the variable T in modified first differences is not used; rather, the modified first difference of the variable itself is utilized. *See* EHRLICH 27.

use of the death penalty decreases the number of murders" (U.S. Br. 36), an examination of the Ehrlich manuscript reveals that such a conclusion is completely unfounded. The paper is riddled with theoretical and technical errors that render its conclusions meaningless. Despite the complicated array of mathematical symbols and econometric terminology, the draft is a creation of mere arbitrary assumptions, misleading summarizations, and reckless inferences. It is marked by evasiveness about data sources and failure to test effectively the validity of the theoretical model on which the paper's conclusions depend. The nature of the evidence and analysis which it marshals in support of the argument for the deterrent effect of capital punishment is of such poor quality that the manuscript casts no doubt at all on the conclusion of every other systematic study over half a century:[9] that

[9] Ehrlich's "sophisticated regression analysis" (U.S. Br. 9) is, in fact, inferior in several respects to the less hieroglyphical earlier studies. Behind the Ehrlich model is the assumption, *see* p. *infra*, that whatever variables determine the murder rate in, for example, Vermont also determine the murder rate *in exactly the same way* in Mississippi. The data in the paper is derived from the United States as an undifferentiated whole, and the estimating procedures encompass all States, including those which have abolished the death penalty. Ehrlich's failure to specify data sources (as noted *infra, see* note 18) makes it impossible to be certain how some data is derived; but he frequently adverts generally to National Prisoner Statistics (*see, e.g.*, EHRLICH F8 n.23; F11 n.29). His aggregation of this data, without indicating its limitations, ignores the explicit warning attached to the NPS statistics by the United States Department of Justice:

> " 'Whereas NPS is a voluntary program, many reporting jurisdictions have been unable to provide program data to due [sic] exigencies related to each budget, personnel, or program situation. As a result, the statistics *** are not complete and do not represent composite nationwide figures. [Consequently they] should be used primarily in making year-to-year comparisons in those States where all required information was reported.' . . . Particular care should be taken in analyzing differences from year to year, as well as across States. Variations in annual figures are often the product of nothing more than changes in

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the death penalty shows no deterrent effect upon murders.[10]

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> reporting practices. For example, special care should be taken in analyzing data subsequent to 1967. When publication of the national prisoner statistics lapsed for 3 years after 1967, data eventually collected for 1968, 1969, and 1970 were less complete and reporting by some States was less rigorous than in previous years."

U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 (1973) at 346 (this warning is quoted from the annual NPS reports). Earlier studies avoided such data aggregation problems by using a cross-sectional analysis of individual states. *See, e.g.*, Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703, 706; Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 58 (1952); MATTICK, THE UNEXAMINED DEATH 11 (1966); Reckless, *The Use of the Death Penalty–A Factual Statement*, 15 CRIME & DELINQ. 43, 44-47 (1969); Sellin, *Homicides in Retentionist and Abolitionist States*, in SELLIN (ed.), CAPITAL PUNISHMENT 135-138 (1967). Furthermore, because of the mathematical form specified, the Ehrlich model is incapable of utilizing $P_{e|c}$ variables when the variable value equals zero, *see* pp. *infra*. Thus, this analysis cannot be focused upon the effect of abolishing and subsequently reintroducing the death penalty in a particular state. Earlier studies analyzed these phenomena and concluded that abolition and reintroduction of the death penalty had no effect on the homicide rate. *See, e.g.*, Cobin, *Abolition and Restoration of the Death Penalty in Delaware* in BEDAU (ed.), THE DEATH PENALTY IN AMERICA 359, 373 (rev. ed. 1967); Dann, *Abolition and Restoration of the Death Penalty in Oregon, id.* at 343, 350; Sellin, *Experiments with Abolition*, in SELLIN (ed.), CAPITAL PUNISHMENT 122-124 (1967); FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972) at 55-62; Samuelson, *Why Was Capital Punishment Restored in Delaware?* 60 J. CRIM. L., CRIM. & POL. SCI. 148, 150-151 (1969).

[10] The assertion that pre-Ehrlich studies "have relied not upon the actual use of the death penalty, but upon its statutory authorization as the independent variable against which the murder rate was compared," (U.S. Br. 36 (emphasis in original)) is simply incorrect. Studies have been conducted of the

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1. Arbitrary Choice of Explanatory Equation

Regression analysis often requires the use of essentially arbitrary assumptions[11] about the mathematical form of

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correlation between homicide rates and lagged execution risk for eleven states over a seventeen year time series, Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54 (1952); of a similar correlation between homicide rates and execution risk for a fifty year period in Ohio, *see* OHIO LEGISLATIVE SERVICE COMM'N, STAFF REPORT NO. 46–CAPITAL PUNISHMENT (1961); of homicide rates in the weeks before and after well publicized executions, Dann, *The Deterrent Effect of Capital Punishment*, FRIENDS SOCIAL SERVICE SERIES, Bulletin No. 29 (Third Month) 19 (1935); Savitz, *The Deterrent Effect of Capital Punishment in Philadelphia*, in BEDAU (ed.), THE DEATH PENALTY IN AMERICA 315-322 (rev. ed. 1967); Graves, *The Deterrent Effect of Capital Punishment in California, id.* at 322-332. And the Government's assertion that all of the available studies of the deterrent effect of capital punishment "have evaluated the effect of the death penalty on the overall murder rate, rather than on the rate of capital murders" (U.S. Br. 36) is similarly mistaken. A recent study has used data that "permit a direct . . . assessment of the relationships between capital homicides and the death penalty." Bailey, *Murder and the Death Penalty*, 65 J. CRIM. L. & CRIM. 416, 418 (1974). "The findings . . . are . . . consistent with those of earlier investigations of homicide and contrary to the results deterrence theory would predict." *Id.* at 423. Ehrlich's study *does* evaluate "the effect of the death penalty on the overall murder rate" (U.S. Br. 36).

[11] For example, a curious result of the form chosen by Ehrlich is that there is a hypothesized constant elasticity relation between the probability of execution given conviction ($P_{e|c}$) and the murder rate throughout the range of the data. In other words, a certain percentage change in the execution rate will effect a fixed percentage change in the murder rate at *any* level. Nothing justifies such an assumption. (Moreover, any change in the execution rate after a year in which there were no executions is undefinable in percentage terms.

There also appears to be no justification for some of the relationships assumed. For example, the proportion of 14-24 year-olds in the population, A, might be incorporated in the regression as a squared term rather than as the value itself. This

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the relationship (*e.g.*, whether the relevant variables combine multiplicatively or additively). One may have confidence in the results only if it can be established *ex post* that the result is insensitive to an initially arbitrary assumption. Ehrlich's work is, however, completely dependent upon his initial assumption of a particular mathematical form. When the assumption is varied–*i.e.*, when another equally reasonable mathematical form for the regression is substituted–the apparent deterrent effect of execution vanishes.[12] To put the matter simply, Ehrlich's conclusion is an artifact of his mathematics and proves nothing at all about the real world. His statement that "[t]he regression results are found to be robust with respect to the functional form of the regression equation" (EHRLICH 36) is misleading and erroneous.

In addition, Ehrlich's model is faulty both in its theoretical structure and in the objective variables chosen as substitutes for the hypothesized variables. It is structured in such a way that the inevitable errors in data gathering over long periods of time will artificially produce a negative correlation between the critical

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particular specification could be supported by assumption, just as Ehrlich has justified his use of A itself in a multiplicative form; or on grounds that each additional 14-24 year-old added to the population contributes to crime *both* independently of his contemporaries and in a consortium with them; or by observing that it produces a regression equation that fits the data better.

[12] For a demonstration of the inversion of Ehrlich's results using a similar multiple regression analysis with a different mathematical form, see Passell & Taylor, *The Deterrent Effect of Capital Punishment: Another View*, Columbia University Discussion Paper 74-7509 (March, 1975) at 6e-7e (appended *infra* as Appendix E and hereinafter cited as PASSELL & TAYLOR).

independent variable $P_{e|c}$ and the murder rate.[13] It cannot cope with years in which there are no executions (and in which $P_{e|c}$ would thus equal zero) because the logarithm of zero cannot be taken. Ehrlich deals with this problem by another arbitrary assumption. Although the actual number of executions in the years 1968, 1969, and 1970 was zero, he assumes that it was one. But because his mathematical form requires only that the coefficient of $P_{e|c}$ in these years not equal zero, a better approximation of reality in this time period would have been to assume that the number of executions was a fraction *very close* to zero. Such an assumption, unhappily for Ehrlich, would defeat his estimation and utterly destroy his demonstration of a deterrent effect stemming from executions; so he chooses not to make it. Similarly, when he substitutes objectively measurable factors for his

[13] The key variable, $P_{e|c}$, is measured in such a way as to induce an artificial inverse relationship with the murder rate. In a footnote (EHRLICH F8 n.23), Ehrlich indicates that the denominator of this variable is measured as

$$c = Q^o \cdot P_a{}^o \cdot P_c{}^o{}_{|a}.$$

Since the numerator of his dependent variable, the murder rate, is Q^o, and Since Q^o is contained in the denominator of his independent variable $P_{e|c}$, it follows that measurement error (in any direction) in Q^o would bias his key coefficient negatively. So if, for example, some crimes that were classified as "homicides" in one year would have shown up as "manslaughters" or "suicides" or "missing persons" if they occurred in another year, for whatever reasons (*see* note 9 *supra*), then Ehrlich's model will have found some degree of systematic negative relationship between the murder rate and the conditional execution probability due to this measurement error.

hypothesized variables,[14] the substitution is frequently arbitrarily made.[15]

Finally, the precise mathematical estimates of the deterrent effect of capital punishment generated by the Ehrlich model are unacceptable because of his failure to identify data manipulations, and to employ reliable statistical procedures.[16] The sources of the data used in his paper are not identified, making it extremely difficult to replicate the results described in the paper[17] or to

[14] Indeed, the theoretical justification for substituting the three objective deterrence variables is itself open to question. Such substitution entails, for example, the assumptions that the individual potential killer in Maine is deterred by knowledge of an execution in Georgia, and that clearance rate for murder in California affects the expectation of apprehension of the potential murderer in Alabama.

[15] For example, the same pages of the UCR data from which Ehrlich presumably obtained his clearance rate statistics (which are used as an objective measure of the probability of arrest) show a separate figure for arrests. Ehrlich provides no justification for his choice of clearance rate as an objective surrogate for P_a: He neither tests both surrogates nor theoretically justifies his preference. To be sure, clearance rates include crimes which are committed by more than one person and therefore may represent, better than arrest rates, the likelihood of being apprehended for a crime; but clearance rates also include a considerable number of confessions by persons in custody for other crimes (as well as murder-suicide episodes) and are, in this way, less suitable than arrest statistics in demonstrating the probability of apprehension for a crime.

[16] Ehrlich fails to report readily available tests that show how well the functional form of the regression equation he uses fits the data in comparison with other standard functional forms. For examples of such tests, *see* DRAPER & SMITH, APPLIED REGRESSION ANALYSIS 163-216 (1966).

[17] The procedures by which Passell & Taylor generated data similar to those used by Ehrlich are described *infra*. PASSELL & TAYLOR 14e. The discrepancies which appear when even slightly different data are used attest to the extreme instability of the model. *Id.* at 3e.

check the correctness of the data and computations used.[18] Derivation of the results is further clouded by frequent reliance on obscure (rather than publicly available) data sources[19] and by generation of non-empirical data by undescribed interpolation methods.[20]

2. Incorrect Assumptions Concerning the Stability of Causation of Homicides Over Time

Any statistical inference about deterrence from Ehrlich's regression analysis depends upon the assumption of temporal homogeneity–*i.e.*, that the exact mathematical relationship among Ehrlich's eight independent

[18] The obscuring of data sources and the frequent failure to describe computations makes it difficult to check the correctness of the mathematical calculations in the manuscript. A number of clear errors occur, however. Table 3 (which provides a rare opportunity to check Ehrlich's computations) contains at least two errors: the natural logarithms of the means for the $P_{e|c}$ and U variables are incorrectly calculated. A central finding of an earlier Ehrlich study (of the deterrent effect of expenditures for police) was revised between successive published versions, *compare* Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521 (1973) *with* Ehrlich, *Participation in Illegitimate Activities: An Economic Review*, in BECKER & LANDES (ed.), ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 68 (1974), because a dichotomous variable representing Southern states (an incidental variable used primarily for the purpose of statistical control) was improperly weighted. This produced a revision from −3.04 percent to −1.42 percent in Ehrlich's estimated effect on the crime rate of a one percent increase in police spending.

[19] *See, e.g.*, note 25 EHRLICH F9 n.25: "I am indebted to Edi Karni for making available to me his calculations of Y_p."

[20] *See, e.g.*, EHRLICH Table 3, note a: "The figures for $P_c^o{}_{|a}$ (1933-1935) and XPOL (all the odd years 1933-1951) were interpolated via an auxiliary regression analysis.

variables and the murder rate remained constant over the entire measurement period 1935-1969. This is only one of several curious assumptions of homogeneity that are concealed in Ehrlich's basic equation. *See, e.g.*, notes 9, 10, 11, *supra.* The equation is akin to assuming, for example, that an increase in highway speed will have an *identical* quantitative effect (in percentage terms) on traffic accidents whether the increase is made from five miles per hour to ten miles per hour *or* from fifty miles per hour to one hundred miles per hour–whether it occurs in New York or New Mexico–whether it occurs under the traffic conditions of 1935 or 1969–etc. In Ehrlich's case, most of these kinds of assumptions are both questionable and unverifiable in terms of his data; but his assumption of temporal homogeneity is verifiable, and it is wrong. A separate statistical test of temporal homogeneity reveals that, for the estimation period 1935-1962, no deterrent effect such as Ehrlich finds for 1935-1969 is discernible. During the 1935-1962 period, in fact, the effect of capital punishment in Ehrlich's model, was to *encourage* rather than to deter murder.[21] We should make clear that this does not mean Ehrlich has shown a deterrent effect for one period but not for the other. Rather, it means that because of an erroneous assumption of homogeneity among included periods, Ehrlich has shown nothing at all. His assertion that "the qualitative results reported in Table 4 are insensitive to changes in the specific interval of time investigated in the regression analysis, as indicated by the results reported in Table 7" (EHRLICH 37) is in error.

Thus (as Ehrlich himself hints in a footnote (EHRLICH F10, n. 28)), the entire burden of his

[21] *See* PASSELL & TAYLOR, *infra*, at 4e-6e.

conclusions regarding the deterrent effect of capital punishment rests on the time period 1963-1969. Of course, executions fell from few to none during the 1960's and murders rose during this period. But crime in general rose during the 1960's—far more sharply than did murders[22]—so that Ehrlich's results reflect nothing more or less than an observation of the general crime trend of the sixties which conveniently ignores both the steep climb of other crimes relative to murder and the numerous factors relevant to the rise of *all* crime in 1963-1969.[23] During this period, for example, the number of hand guns in the possession of the public skyrocketed, racial friction escalated, expectations about the abolition of poverty were raised and dashed, juvenile

[22] *See* footnote 30 to the text of this reply brief, p. , *supra.*

[23] Ehrlich fails to correct his 1960's murder statistics for this general crime rise. While it may be impossible to isolate *all* of the factors which led to the general increase in crime, it would be possible to adjust the murder rate for these years to compensate for conditions which were causing a general crime rise. Furthermore, Ehrlich has failed to include as a control variable in this study a variable, income dispersion, which he earlier posited to have a significant relation to the crime rate, even though he attempts to explain variation in precisely the same dependent variable (the murder rate) in both studies. *See* Ehrlich, *Participation in Illegitimate Activities: An Economic Review* in BECKER & LANDES, ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 68-134 (1974). In the earlier study, *id.* at 101, Ehrlich incorporated a measure of income dispersion as a factor to be taken into account in his regression equation analyzing the effects of changes in the probability and length of incarceration on the murder rate. For reasons that are unclear, he does not use this as a control variable in his capital punishment study, despite the fact that the United States Census Bureau keeps data on the distribution of income throughout the country in time series. *See, e.g.*, UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: CONSUMER INCOME, Series P-60, No. 97 (1975).

delinquency increased, the abuse of narcotic drugs increased, and economic crime (robbery, burglary) multiplied. All of these variables have dimensions which are objectively measurable, yet all are excluded from Ehrlich's analysis.[24] Under the arbitrary and inflexible Ehrlich model, the contribution of all these variables to the murder rate rise is unknowable, and even the most tentative assertion that the decline in executions during 1963-1969 was responsible for this rise is by *ipse dixit* rather than statistical demonstration.[25]

Furthermore, although Ehrlich made an earlier study of non-capital crimes which concluded that the length of prison sentence is an important deterrent,[26] his present capital punishment study fails to control for variations in the length of prison sentences imposed upon convicted murderers who were not sentenced to death. Rather, Ehrlich arbitrarily (and incredibly) assumes that alternative sentences for homicides were constant during the

[24] An earlier Ehrlich econometric study, Ehrlich (1974), note 23, *supra*, found an apparent deterrent effect on the crime rate based on both the probability and severity of punishment. However, a replication of this study, using data from a later period, which included variables reflecting population density, population migration, and broken family rates, demonstrated that the apparent deterrent effect disappears under a model that incorporates a larger set of explanatory variables. Forst, *Participation in Illegitimate Activities: Further Empirical Findings*, 2 POLICY ANALYSIS (No. 3) (Univ. of Cal. Press) (to be published Summer, 1976).

[25] Ehrlich recognizes the critical importance of the years 1962-1969 to the results he demonstrates (EHRLICH F10 n.28) but asserts that this interval is "particularly important . . . because of the greater variability exhibited in this sub-period by P_a, $P_{c|a}$, $P_{e|c}$." *Ibid.* In view of the failure to control for other variables affecting the homicide rate during the 1960's the assertion is utterly groundless.

[26] EHRLICH (1974), note 23, *supra.*

period he surveyed. EHRLICH 43-44. Given Ehrlich's own theory of the deterrent efficacy of punishments generally, it is obvious that the rise in the homicide rate during the 1960's–critical to Ehrlich's ultimate conclusion–might be more than adequately explained by the decline in length of prison sentences imposed for homicide during this period.[27] But even this is not the full measure of the deficiency of Ehrlich's model arising from his failure to consider other punishments than death. The plain fact is that Ehrlich does not purport to address the *only* deterrence question that is relevant to a choice between capital punishment and other criminal penalties: their relative deterrent effect. Ehrlich attempts to predict the differential effect of increasing the number of executions during the 1935-1969 period, but he nowhere attempts to compare the effect of the imposition of life imprisonment on the homicide rate to the effect of the imposition of the death penalty (*e.g.*, by comparing the coefficient of $P_{LI|c}$ to that of $P_{e|c}$.

[27] Data from the 33 States that reported both in 1960 and in 1970 indicates that the mean length of prison sentence appears to have declined during this period. In 1960, 46.8% of prisoners released who had been convicted of homicide had served at least five years; in 1970, only 35.8% of this group had served this long a term. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS: PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS 1960 (undated) at 23-70; UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, STATE PRISONERS: ADMISSIONS AND RELEASES 1970 (undated) at 47-81.

3. Interdependence of "Independent" Variables

The theoretical portion of Ehrlich's paper acknowledges that the interrelations between society, the judicial system and the behavior of murderers are complex. Potential murderers are assumed to respond to incentives–the probability of punishment, the severity of punishment, etc.–but the incentive structure itself is simultaneously determined by the number of murders taking place. Thus, while punishments affect murder rates, murder rates also affect punishments. Moreover, the variables that influence murderers in Ehrlich's model are themselves interrelated: the probability of jury conviction for murder (a possible deterrent) is not unrelated to the probability of execution given conviction (another possible deterrent). Measuring the deterrent effect of executions on murders while *holding all other variables constant* is impossible; all other variables *cannot* be held constant because of their interrelationship.[28]

The problem here is that a single equation does not get to the root of the relevant relationship (the *net* impact of executions upon murders in the United States). It is perhaps made clearest by analogy. If one ignores relationships in the way that Ehrlich does, it might be possible to demonstrate statistically that a team of midgets will win the American League Pennant because–*holding constant* batting, fielding, pitching, and base-running–midgets have a smaller strike zone than normal players, and will therefore draw more walks and consequently score more runs. The force of the statistical demonstration is powerful until one considers whether a team of midgets really can bat, field, pitch, and run bases like the Oakland

[28] For a more detailed discussion of these problems, see PASSELL & TAYLOR, *infra*, at 7e-10e.

A's. Ehrlich's own inadequate appreciation of the problem of interrelationship among the variables determining murder rates is peculiarly damaging to his conclusion because, under his theoretical model, convictions have a stronger deterrent effect on murder than do executions.[29] Therefore, if it is the case—as knowledgeable observers have repeatedly asserted (*see* references cited in Pet. Br. 90, n. 133)—that the probability of execution-given-conviction decreases the probability of conviction, Ehrlich's model suggests that capital punishment will actually *increase* the rate of murders. We say "suggests" because the model with its manifold defects is as incapable of demonstrating this conclusion as it is of demonstrating anything else.

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The Ehrlich manuscript is, then, so deeply flawed that it neither adds to our knowledge concerning the deterrent efficacy of criminal punishment nor calls into question the previous studies of the deterrent effect of the death penalty. Among other defects: (1) The result is completely dependent upon arbitrary assumptions regarding the mathematical form of relationships among variables; equations based upon alternate assumptions produce opposite results. (2) An opposite result is obtained by similar analysis of the period 1935-1962; the Ehrlich

[29] Ehrlich explicitly posits that the probability of conviction has a greater deterrent effect than the probability of execution: "*A fortiori*, a one percent increase in $P_{c|a}$ is expected to have a greater deterrent effect than a one percent increase in $P_{e|c}$ as long as $P_{e|c}$ is less than unity." EHRLICH 10. The elasticity coefficients derived for $P_{a|c}$ are consistently stronger than those derived for $P_{e|c}$. *See also* EHRLICH 9-11, 20, 34, 46.

result is therefore dependent upon the assumption that the increase in murder rates during the 1960's was determined by the simultaneous decrease in execution rates rather than by the factors which the Ehrlich equation fails to control and which are known to have contributed to a general increase in crime rates over that period. (3) The Ehrlich analysis ignores the interdependence of relevant variables: most notably the probability (based upon the most consistent observation of modern use of the death penalty—the phenomenon of jury nullification) that a significant increase in execution rate will result in a decrease in conviction rate. Yet, the decrease in conviction rate should, by Ehrlich's own analysis, increase murder rates sufficiently to offset any deterrent value of execution. The precision of Ehrlich's announced results, in the face of the data limitations and the theoretical problems involved in accurately isolating and quantifying the factors which influence the murder rate, is utterly delusory and constitutes a serious distortion of the proper uses of linear regression analysis. The fact that the conclusions of the Ehrlich study stand so starkly alone, in contradiction to over half a century of research, *see*, Pet. Br. App. E. at 1e-10e, is itself a significant indication of the study's abandonment of scientific method to cybernetic technology:

> "no scientist should be persuaded to abandon his scientific insight and principles in favor of some computerized statistical screening procedure. The use of multiple regression techniques is a powerful tool only if it is applied with intelligence and caution."[30]

[30] DRAPER & SMITH, APPLIED REGRESSION ANALYSIS (1966) 242.

APPENDIX D

March 27, 1975 letter from National Bureau of Economic Research, Inc., President John R. Meyer to Counsel for Petitioner.

March 27, 1975

Mr. David E. Kendall
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle
New York, N.Y. 10019

Dear Mr. Kendall:

This is in reply to the questions contained in your letter of March 17.

1. Has this report been officially approved in any way by the NBER?

Answer: The working paper in question has not been approved for National Bureau publication nor has it been submitted for approval.

2. Was this report previously available to interested members of the general public?

Answer: It was not available to interested members of the public. A very limited number was circulated to interested scholars.

3. What is the nature of the "informal" distribution of NBER working papers?

Answer: NBER policy concerning the reproduction and distribution of working papers is outlined in two memoranda by Robert T. Michael, Assistant Vice President, dated June 20, 1973. Copies of these memoranda are enclosed.

4. What is the nature of the review process accorded official NBER publications?

Answer: The policies and procedures governing NBER review of publications are described in the front of each official NBER publication. I enclose a copy of this as well.

5. What is the relationship between the November, 1973, Ehrlich paper and the paper which NBER will publish in June 1975?

Answer: The NBER will not be publishing a paper on this subject in June 1975 nor is it considering publication at this time. Professor Ehrlich is publishing a much reduced version of the working paper in the *American Economic Review* in June 1975. This paper is not an official NBER publication and this fact will be clearly stated. Professor Ehrlich is now working on an extension of his research making use of cross-state comparisons. It is possible that this newer work may be combined with some of his previous work and, if review by the staff leads to that recommendation, might be submitted for official NBER review at some later time.

I hope these answers are sufficiently responsive. If additional information is required, please contact us.

Sincerely yours,

/s/ John R. Meyer
John R. Meyer

JRM:jh

[NOTE: the documents referred to in #3 and #4 of this letter, and appended to it, have been omitted because they do not appear presently relevant.]

APPENDIX E

Peter Passell & John B. Taylor, Columbia University
Discussion Paper 74-7509 (March, 1975), *The Deterrent Effect of Capital Punishment: Another View*

INTRODUCTION

In a recent paper Isaac Ehrlich (1975) has discovered a negative relationship between the use of the death penalty and homicide rates in the United States over the last four decades. This empirical finding takes on special meaning because (a) it is the first test of the capital punishment deterrence hypothesis to use simultaneous equation estimation techniques; (b) its publication comes at a time when state legislatures and the courts are reshaping policy on the imposition of the death penalty. Hence the importance of a second look at Ehrlich's result.

Such a re-examination, described below, shows that the time series model and data used by Ehrlich permit no inference whatsoever about the deterrent effect of capital punishment. His findings are extremely sensitive to essentially arbitrary choices of model specification and to the period over which the model is estimated. Moreover, estimation of a single structural equation sharply limits the policy implications of the estimated coefficients.

Section I describes the replication of Ehrlich's murder rate function, Section II tests the model for temporal homogeneity, and Section III examines its sensitivity to changes in functional form. Finally, Section IV examines the pitfalls of inferring an execution-murder trade-off from a single equation.

I.

MODEL REPLICATION

A representative sample of the empirical results reported by Ehrlich in support of the deterrence effect of capital punishment is his equation 1, Table 4 which is displayed as our equation (a), Table A; we use the same notation as Ehrlich. In this regression equation the logarithm of the U.S. annual murder rate $(Q/N)^o$ is explained by the logarithm of three deterrence variables (the clearance rate for murder $(P_a{}^o)$, the conviction rate for murder $(P_c{}^o{}_{|a})$, and the execution rate for murder lagged one year $(PXQ_1)_{-1}$) as well as by the logarithm of five other explanatory variables (the labor force participation rate (L), the fraction of the population between 14 and 24 years of age (A), the permanent real per capita income (Y_p), the unemployment rate (U), and an exponential time trend (e^T)). The equation is estimated by a two-stage procedure in which $P_a{}^o$ and $P_c{}^o{}_{|a}$ are treated as endogenous variables, and are first regressed on current and lagged values of the predetermined variables, lagged values of all the endogenous variables, and a group of otherwise excluded exogenous variables (real police expenditure per capita (XPOL), real government expenditure per capita (XGOV), and the fraction of nonwhites in the population (NW)). In the second stage an iterative procedure is used to estimate the first order serial correlation coefficient along with the coefficients of the endogenous and predetermined variables.

For the purpose of this paper the important estimated coefficient of equation (a) is that of $(PXQ_1)_{-1}$ which is negative and significant. It is such an estimate which Ehrlich uses to calculate that one additional execution per year may result in as many as 17 fewer murders.

Ehrlich presents several variations of this same model (Ehrlich, Tables 3 and 4), among which the major differences are the use of alternatives to $(PXQ_1)_{-1}$ as empirical surrogates for $P_{e|c}$, the subjective conditional probability of execution given conviction.[1] Neither prior judgment nor the estimated coefficients provide much basis for choosing among the alternative forms. We chose to concentrate our research on the form represented by equation (a), because it is the most common in Ehrlich's tables and permits convenient comparisons with the tradeoffs computed by Ehrlich.

Equation (b) of Table A shows one attempt to replicate equation (a) using the same iterative procedure to estimate the first-order serial correlation coefficient p in the second stage. Explicit definitions and sources for all variables used in this replication are found in the Appendix. Note that many of the estimated coefficients and t-ratios in equation (b) are substantially different than in equation (a). In particular, the estimated coefficient of $(PXQ_1)_{-1}$ is not statistically significant[2] in equation (b).

This discrepancy can be ascribed either to seemingly minor differences in the data or to unspecified procedures for creating variables or estimating missing observations. Since Ehrlich does not specify such procedures it is impossible to exactly duplicate his results (the apparent sensitivity of the Ehrlich results to minor data variations is, however, striking).[3] Our permanent income series is different because Ehrlich's method of calculation is not stated. Further, our labor force participation series[4] is different, as are the missing observations on police expenditure which Ehrlich estimates by an unspecified interpolation or smoothing procedure. Probably more important, however, is the 1933-35 data on conviction rates not collected by the *UCR* and estimated by Ehrlich

using an unspecified auxiliary regression which could not be duplicated. Instead we used an alternative data source, the *Judicial Criminal Statistics* estimates of percent of persons found guilty as charged for murder.[5]

It is quite likely that this pre *UCR* data discrepancy is the reason for the major discrepancy between our estimate of p and Ehrlich's. Therefore, we re-estimated the equation constraining p to be .059 in equation (c). These estimates are closer to Ehrlich's, particularly with regard to the significance of the three deterrent variables.

In order to minimize the effect of the 1933-35 data,[6] we truncated these years from the sample. The results of this estimation are found in equation (d) and are quite similar to Ehrlich's. In particular the coefficient of $(PXQ_1)_{-1}$ is significant and the coefficients of $\hat{P}_a{}^o$ and $\hat{P}_c{}^o{}_{|a}$ have the same relative values found by Ehrlich.[7] Confidence in the comparability of equation (d) with (a) is reinforced by the similarity between our estimate with an additional three years truncated (equation (e)) and Ehrlich's estimate over the same period (see his equation 6, Table 4). In any case for the sensitivity analysis of the following Sections, equation (d) will be taken to represent Ehrlich's model and empirical findings.[8]

II.

TEMPORAL HOMOGENEITY

Behind the use of time series estimation is the assumption that the structure and the coefficients to be estimated remain stable over the sample period. In Ehrlich's case it is assumed that the behavior of potential murderers is governed by the same variables with the

same coefficients over the period 1938-1969. If this assumption is in fact not correct, the estimated function would have little use either as an explanation of the causes of murder or of the policy implications of changing the value of an exogenous variable in the structure.

The assumption can be tested. Consider for example the hypothesis that the murder rate function estimated in equation (d) has the same structure from 1938-1962 as from 1963-1969. Equation (f) Table B with the time series truncated at 1962 was estimated to test this hypothesis. The F-ratio, computed from the sums of squared residuals in equations (d) and (f) was 4.715, significant even at the 99% level. Thus the hypothesis of structural homogeneity must be rejected. Further, there is nothing special about the sample periods chosen for this test. Similar tests were computed[9] for the four possible structural shift points from 1961-1964; the F-ratio indicates a significant shift for each of these periods. It is clear therefore that Ehrlich's equation has been estimated over different regimes, a fact which vitiates the validity of his estimates.

Since our primary interest is in the deterrent effect of capital punishment, it is important to note that the coefficient of $(PXQ_1)_{-1}$ is very different in equations (d) and (f); turning from negative and significant to positive and insignificant when the sample period is changed. The F-test for the entire equation does not, however, rigorously exclude the possibility that changes other than changes in the coefficient of $(PXQ_1)_{-1}$ have generated the statistical significance.

Equations (g) and (h) in Table B provide a test of the hypothesis that the coefficient of $(PXQ_1)_{-1}$ is the same over two sample periods under two different sets of assumptions. In equation (g) we add a variable, P63,

equal to zero in the years 1938-1962 and to $(PXQ_1)_{-1}$ in the years 1963-69. The t-ratio of this variable gives a test of this homogeneity hypothesis, given that all other coefficients are the same over the two periods. The value of the statistic indicates rejection of the hypothesis at the 95% level. To equation (h) we add another variable, C63, equal to 0 from 1938-62 and to 1 from 1963-69. The t-ratio of P63 in this equation gives a test of the hypothesis of homogeneity of the coefficient of $(PXQ_1)_{-1}$, given that all variables except the intercept are stable over the two periods. The value of this statistic also indicates rejection of homogeneity.

III.

SPECIFICATION SENSITIVITY

Theory suggests that an econometric structure should be specified in the mathematical form which conforms most closely to behavioral expectations. In practice, forms are usually chosen which are linear in the parameters to make it possible to interpret the statistical properties of the estimators. And commonly, the logarithmic form is chosen to facilitate interpretation of the linear parameter estimates as partial elasticities. In this latter case, the procedure is often justified *ex ante* on economic grounds–relationships are expected to exhibit constant elasticities in the relevant range; or, *ex post*–the log-linear form is more consistent with the data than alternative forms.

In the case of Ehrlich's choice of the log-linear form neither justification is convincing. While the elasticity of murder rates with respect to the conditional probability of execution might be approximately constant over some

range of the variables, we see no reason why this constant elasticity should hold over the very large range in the observed time series. In fact such an assumption is absurd when the estimated probability of execution drops to zero beginning in 1968. Ehrlich artificially avoids this absurdity by assuming that the number of executions is equal to one in years when it is actually zero.[10]

The two equations in Table C examine two different functional forms for the murder rate regression. Equation (i) is a linear rather than a log-linear form. It is striking that all the estimated coefficients in the linear form have the same sign as in the log-linear form, *except for one*: the estimated probability of execution, which is perversely positive though not significant, rather than negative and significant. Therefore Ehrlich's discovery of a deterrent effect of capital punishment depends on a choice of functional form that is utterly arbitrary. This extreme sensitivity of the capital punishment deterrent result to functional form is further emphasized by equation (j) in which all variables except $(PXQ_1)_{-1}$ are in the log form. Again the coefficient of the execution variable is radically different than Ehrlich's equation.[11]

This sensitivity can be explained intuitively by Figure 1, which shows plots of PXQ_1 and the log of PXQ_1 over time. The radically different time shape coupled with the fact that the log is approximately linear over the range of the other variables (in particular the murder rate shown in Figure 2), implies the two forms will generate vastly different results.

TABLE C. Specification Sensitivity

Equation	Constant	$\hat{P}_a{}^o$	$\hat{P}_c{}^o{}_{\|a}$	$(PXQ_1)_{-1}$	L	A	Y_p	U	T
(i) 1938-69	.194	−.406(−3)	−.595(−3)	.134(−2)	−.173	.133	.643(−4)	.629(−3)	−.205(−2)
R^2 = .941	(3.26)	(−0.81)	(−2.25)	(1.04)	(−2.16)	(1.78)	(3.26)	(1.40)	(−2.97)
SSR = .113(−3)									
$\hat{\rho}$ = .578									
(j) 1938-69	−5.411	−1.323	−0.435	0.012	−0.935	0.526	1.641	0.062	−0.032
R^2 = .936	(−0.81)	(−1.79)	(−2.40)	(0.55)	(−1.10)	(2.11)	(2.36)	(1.41)	(2.24)
SSR = .039									
$\hat{\rho}$ = .690									

Equation (i) is linear in all the variables, while equation (j) is log-linear in all the variables except $(PXQ_1)_{-1}$ and T which enter linearly. The method of estimation and notation is the same as in Table A. The integers in parenthesis next to the estimated coefficients in equation (i) indicate multiplication by that power of ten.

FIGURE 2

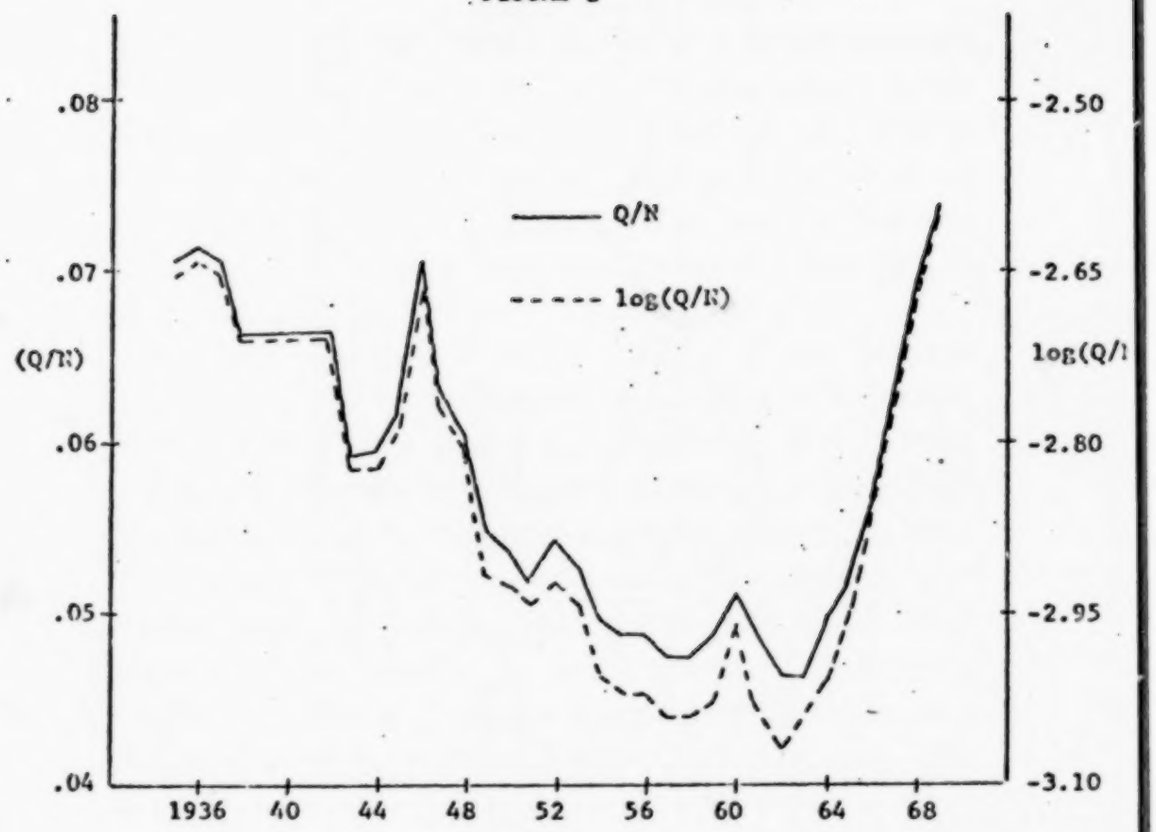
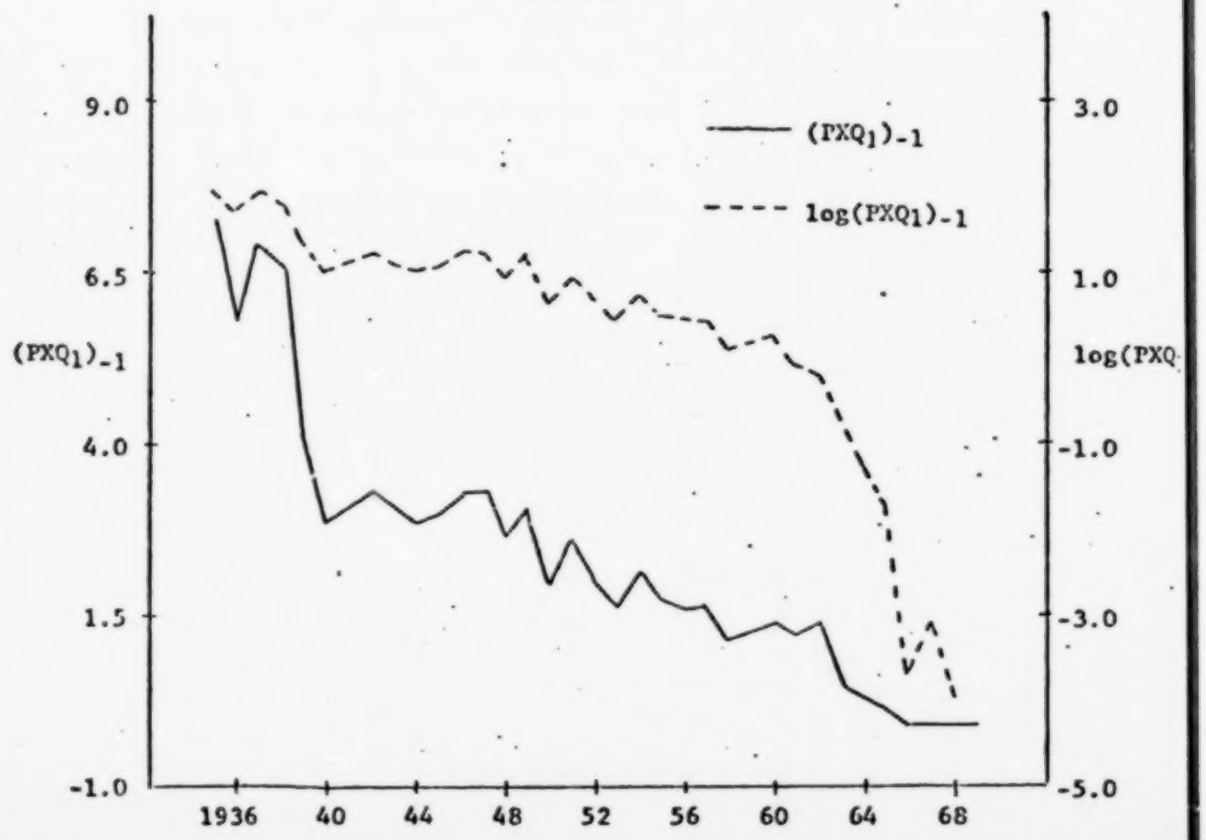


FIGURE 1



10 Columbus Circle
New York, New York 10019
April 20, 1975

Mrs. Helen K. Loughran
Assistant Clerk
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Dear Mrs. Loughran:

I enclose forty (40) copies of two tables which were inadvertently omitted from Appendix E of petitioner's reply brief in *Fowler v. North Carolina*, No. 73-7031. Could you please insert these two pages between page 7e and 8e of the reply briefs filed on April 16?

I apologize for this inconvenience. Thank you very much for your assistance.

Sincerely,

/s/ David E. Kendall
David E. Kendall

cc: Hon. Rufus L. Edmisten
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

Hon. Robert H. Bork
Department of Justice
Washington, D.C. 20530

Hon. Evelle J. Younger
800 Tishman Bldg.
3580 Wilshire Blvd.
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236 State Capitol
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Chevene B. King, Esq.
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Richard A. Heim, Esq.
53 Windsor Ave.
Vernon, Connecticut

John J. Abt, Esq.
299 Broadway
New York, New York 10007

TABLE A. Model Replication

Equation	Constant	$\hat{P}_a{}^o$	$\hat{P}_c{}^o{}_{|a}$	$(PXQ_t)_{-t}$	L	A	Y_p	U	T
(a) 1935-69	–4.060	–1.247	–0.345	–0.066	–1.314	0.450	1.318	0.060	–0.046
R^2 = N.A.	(–1.00)	(–1.56)	(–3.07)	(–3.33)	(–1.49)	(2.20)	(4.81)	(2.60)	(–6.54)
SSR = .048									
ρ = .059									
(b) 1935-69	–7.282	–0.811	–0.059	–0.019	–1.347	0.612	1.362	0.0365	–0.028
R^2 = .936	(–1.20)	(–1.06)	(–0.71)	(–0.92)	(1.56)	(2.31)	(2.25)	(0.86)	(–2.24)
SSR = .048									
$\hat{\rho}$ = .748									
(c) 1935-69	–7.672	–0.907	–0.187	–0.061	–0.266	0.251	1.635	0.104	–0.045
R^2 = .924	(–1.72)	(–1.25)	(–1.69)	(–2.77)	(–0.28)	(1.30)	(4.04)	(2.67)	(–5.23)
SSR = .056									
ρ = .059									
(d) 1938-69	0.042	–1.554	–0.727	–0.057	–0.226	.032	1.191	0.073	–0.039
R^2 = .934	(0.01)	(–2.09)	(–3.65)	(–2.88)	(–.256)	(.458)	(2.90)	(1.98)	(–4.66)
SSR = .040									
$\hat{\rho}$ = .026									
(e) 1941-69	9.430	–2.262	–0.896	–0.090	–0.537	–0.181	0.295	0.056	–0.029
R^2 = .922	(1.21)	(–2.56)	(–4.33)	(–4.37)	(–0.58)	(–1.03)	(0.47)	(1.66)	(–2.94)
SSR = .046									
$\hat{\rho}$ = .356									

Equation (a) is the estimate obtained by Ehrlich in his Table 4, equation 1. The same estimation technique was used in the other equations except for (c) where ρ was set to .059. All variables, except T, are in logs and are defined in the Appendix. SSR is the sum of squared residuals and t-ratios are in parentheses below the estimated coefficients.

TABLE B. Temporal Homogeneity

Equation	Constant	$\hat{P}_a{}^o$	$\hat{P}_c{}^o{}_{|a}$	$(PXQ_i)_{-i}$	L	A	Y_p	U	T	P63	C63
(f) 1938-62	−3.681	−0.519	−0.389	0.067	−1.894	0.142	0.638	0.022	−0.018	–	–
R^2 = .969	(−0.98)	(−0.97)	(−3.42)	(1.49)	(−2.78)	(1.05)	(2.08)	(0.80)	(−2.40)	–	–
SSR = .013											
$\hat{\rho}$ = .006											
(g) 1938-69	12.6	−3.45	−0.645	0.075	0.584	−0.105	0.475	0.032	−0.017	−0.113	–
R^2 = .899	(1.19)	(−2.34)	(−1.32)	(1.06)	(0.45)	(−0.40)	(0.74)	(0.58)	(−1.27)	(−1.71)	–
SSR = .064											
DW = 2.04											
(h) 1938-69	8.16	−2.64	−0.569	0.076	−0.194	0.078	0.509	0.023	−0.015	−0.133	−0.083
R^2 = .937	(0.86)	(−2.01)	(−1.34)	(1.34)	(−0.18)	(0.28)	(0.97)	(0.52)	(−1.35)	(−2.52)	(−1.23)
SSR = .040											
DW = 2.14											

Equation (f) was estimated by the same method as the Table A equations. Equations (g) and (h) were estimated by Two State Lease Squares without an adjustment for serial correlation. C63 and P63 equal zero from 1938 to 1962 and equal one and $(PXQ_i)_{-i}$ respectively, from 1963-1969. DW is the Durbin-Watson statistic and other notation is explained in Table A.

IV.

INTERPRETATION OF THE EHRLICH TIME SERIES REGRESSIONS

In this section we abstract from the criticism of Sections II and III to examine another aspect of the analysis. Given that Ehrlich has correctly estimated the murder rate function, is it reasonable to infer a murder-execution tradeoff from the negative coefficient of $P_e{}^o{}_{|c}$?

Ehrlich argues that this estimated coefficient ($\hat{\alpha}_3$) should be interpreted as an estimate of the partial elasticity of murder rates with respect to the risk of execution. Thus he is able to derive the estimated marginal tradeoff between executions and murders: $\Delta Q/\Delta E = \hat{\alpha}_3 (Q/E)$. If one assumes $\hat{\alpha}_3 = -.065$ and Q and E equal to the time series mean values, $\Delta Q/\Delta E = -7.7$. For Q = 10,920 and E = 41, $\Delta Q/\Delta E = -17.3$.

It is important to note, however, that behind this interpretation of $\hat{\alpha}_3$ lie several assumptions. The estimated murder supply function may be written as

$$\log (Q/N) = \hat{\alpha}_1 \log (AR/Q)\, \hat{\alpha}_3 \log (E/C) \ldots ,$$

where AR = murders cleared through arrest, and C = convictions for murder. Note that the number of murders (Q) appears on both sides of the equation. Collecting terms and solving for log Q in terms of log E results in

$$\log Q = \hat{\alpha}_3/(1 + \hat{\alpha}_1) \log E + \ldots$$

Since $\hat{\alpha}_3 < 0$ and $\hat{\alpha}_1 < -1$, the elasticity of Q with respect to E appears to be positive! The logical root of this puzzle is not difficult to find. Ehrlich's calculation is

implicitly based on the assumption that a hypothetical increase in executions will change AR by precisely the right amount such that

$$\hat{\alpha}_1 \ \Delta \log (AR/Q) = 0$$

Our calculation is made with another assumption, i.e., that the number of crimes cleared through arrest would be unaffected by a change in E.

Presumably neither assumption is correct. We do not know what determines clearance rates for murder, but it is completely arbitrary to assume either adjustment in lieu of more information.

This near paradox suggests a more fundamental problem with the Ehrlich analysis. Social scientists interested in economic models of crime explicitly acknowledge the simultaneity of the system—hence the logic of calling criminal behavior functions *supply* functions. Ehrlich has met the technical requirements for econometric identification in his single estimated equation, but has left important questions about the operational meaning of what might be casually construed to be exogenous policy variables.

For example, consider the relationship between the conditional probability of conviction given arrest ($P_{c|a}$) and the conditional probability of execution given conviction ($P_{e|c}$). In order to interpret $\hat{\alpha}_3$ as an elasticity, one must assume that conviction rates will be unaffected by exogenous changes in ($P_{e|c}$)—presumably legal institutional changes affecting jury discretion in capital offense cases. Yet many legal experts and social scientists believe that increases in ($P_{e|c}$) will reduce ($P_{c|a}$), since juries and judges will apply stricter standards for convictions when there is a greater prospect of execution.[12] This widely accepted hypothesis was used successfully as an argument

by 19th and early 20th century legal reform movement leaders bent on abolishing whole categories of capital crimes and granting juries greater discretion in penalties imposed.[13] By Ehrlich's estimated equation (3) in Table 3, if the absolute value of the elasticity of ($P_{c|a}$) with respect to ($P_{e|c}$), (ϵ_{ce}), were greater than .174, the net impact of an increase in execution probabilities would, perversely, raise murder rates. More generally, the impact will be perverse if $|^{\epsilon}ce| > {}^{\alpha}3/{}^{\alpha}2$. And, of course, all this ignores other possible relationships between variables on the right hand side of the supply equation.

This is not an uncommon problem in policy-oriented econometrics, where the focus is on predicting the implications of a policy rather than on correctly estimating individual equations in a structure. If the purpose of the investigation is to estimate the impact of a change in an exogenous policy instrument, executions per conviction, then the relevant coefficient is the coefficient of the execution per conviction variable in the reduced form equation of the entire system.

Ehrlich acknowledges this point of methodology, and in fact estimates a "modified reduced form," achieving significantly negative estimates of α_3 for three of his four alternative estimators of $P_{e|c}$. One might note, however, that for the period 1938-1962 (using all the exogenous variables specified by Ehrlich), the estimated coefficient of log $(PXQ_1)_{-1}$ is insignificant; further, a similar equation using $(PXQ_1)_{-1}$ rather than log $(PXQ_1)_{-1}$ over the full sample 1938-69 also shows an insignificant estimated coefficient. We would place litle weight on either Ehrlich's reduced form estimation or our own variant, since we have no faith that the variables chosen by Ehrlich represent the exogenous variables in the actual structure. On precisely these grounds, Ehrlich refrains from attempting to estimate the rest of the structural equations implied by his theory of crime and law enforcement.

CONCLUSION

This examination of Ehrlich's estimates has limited focus. One might wish to examine further the theoretical basis for including or excluding variables in the model, the relevance of the specific estimators chosen to test the hypothesis about capital punishment deterrence, the quality of the data (particularly for the deterrence variables P_a^o, $P_{c|a}^o$, $P_{e|c}^o$) used in the test, and the aggregation problems imposed by the use of national data.

We have essentially confined ourselves to a narrower analysis. First, we have shown that the estimates are extremely sensitive to the time period chosen and to the mathematical form of the specification. This sensitivity raises grave (and in our own opinion, overwhelming) doubt about the utility of Ehrlich's time series estimates. Second, we have argued that even if Ehrlich has captured the essence of the murder rate function in his regression, it is not possible to infer from it that a change in legal institutions which increased $P_{e|c}$ would reduce murder rates.

In sum, on the basis of Ehrlich's research, it is prudent neither to accept nor reject the hypothesis that capital punishment deters murder. This, of course, does not mean that economic models and statistical inference have no role to play in diminishing our ignorance in this area. Answers, however, must await superior data which allows more conclusive hypothesis-testing.

*The authors would like to thank Phoebus Dhrymes, David Kennett, and Jacob Mincer for their comments and assistance.

[1] Another difference is that civilian population (N) is used as an additional explanatory variable in the first stage of the regressions reported in Table 3 though there is no mention as to why this was done. Since more results are reported in Table 4, we focus on the form used in that table.

[2] All tests of significance in this paper and in Ehrlich's are based on asymptotic distribution assumptions. Thus what are conventionally called t-ratios or F-ratios in the classical linear regression model will only approximately have the appropriate t or F distribution in these models.

[3] The apparent sensitivity of Ehrlich's result to minor data variations is in itself disturbing. While we would not place great weight here on the significance of this sensitivity, we would nonetheless defend our estimation procedure and data set as being an accurate representations of Ehrlich's model. See the Appendix for a detailed description of how our variables are defined and the data sources used.

[4] Ehrlich defines the labor force participation rate as the percentage of the noninstitutional population, 16 years of age and over, in the labor force throughout the sample period. In our series, for years prior to 1947, the base population includes persons 14 years and older. This distinction corresponds with unemployment rate series used by Ehrlich.

[5] This alternative series excludes non-negligent manslaughter and is therefore a different estimate of the true conviction rate for capital offenses than observations based on the *UCR* data. We would, however, place as much confidence in these measures as in a presample extrapolation using the series beginning in 1936.

[6] It should be noted that any error in measuring conviction rates is compounded in errors in the executions per conviction series, which requires an estimate of convictions based on conviction rates. See point 4 of the Appendix.

[7] Ehrlich places great importance on the relative effect of these three probabilities as support for his theoretical analysis. The null hypothesis, that these coefficients are equal to each other, is not tested however.

[8] We also estimated all equations using ordinary least squares with and without the serial correlation adjustments, since the benefit of using Ehrlich's two stage procedures is unequivocal only in large samples. We found the estimates do vary depending on the method used. However, in order to focus on more substantive criticism of Ehrlich's results, we use the same estimation procedure throughout this paper.

[9] These values are 9.925, 3.899, and 3.593 for the samples ending in 1961, 1963 and 1964, respectively. The estimated coefficient for $(PXQ_1)_{-1}$ is positive in all samples, though only significant in the 1938-1961 sample, where coefficient is .1141 with a t-ratio of 3.251.

[10] In replicating Ehrlich's model we also use this procedure. This approach implies that the variable representing probability of execution is actually the inverse of the number of convictions in those years. Even if Ehrlich drops these points from his sample he is still faced with the problem of post-sample prediction.

[11] We might note that we did not need to experiment with numerous functional forms to detect this sensitivity.

[12] See, for example, Vidmar (1972), Bedau (1967), Bennett (1958), Kalven and Zeisel (1966), Zeisel (1968), Knowlton (1953).

[13] See, for example, Shipley (1909), and McCloskey (1973).

APPENDIX: DATA SOURCES

This appendix gives sources for all data used in estimating the above equations as well as describing procedures for creating variables from the raw data and for estimating missing observations. Since Ehrlich (1975) does not provide such information, it is not possible to replicate his results exactly. However, it should be clear from examining this appendix that our choice of data and procedures conform to the descriptions of Ehrlich (1975). Units of measurement are also chosen to correspond, though in the log-linear regressions only the intercept will be affected by such choices.

VARIABLES:

1. *Murder Rate*, $(Q/N)^O = M/N$, where
   M = Number of murders and non-negligent manslaughters per year
   1933-69, Revised series provided by the Uniform Crime Reporting Section of the U.S. Federal Bureau of Investigation,
   N = Civilian population in 1000's,
   1933-57, *HS*, Series A3,
   1958-69, *CPR*, P-25, No. 442.

2. *Clearance Rate for Murder*, P_a^O, percentage of murders and nonnegligent manslaughter cleared by arrest,
   1933-69, *UCR*, Annual Bulletin.

3. *Conviction Rate for Murder*, $P_{c/a}^O$, percentage of persons found guilty as charged for murder and nonnegligent manslaughter,
   1936-69, *UCR*, where two estimates are presented the estimate based on the larger sample was chosen; 1961 was interpolated linearly from the 1962 and 1963 estimates,
   1933-35, *JCS*, (figures exclude nonnegligent manslaughter).

4. *Execution Rate*, $(PXQ_1) = (E/Q \cdot P_a^o \cdot P_{c/a}^o) .10^6$ where,
   E = One year lead of the number of executions for murder
      1934-70, *NPS*, Bulletin No. 46, Aug. 1971, Table 1,
   Q, P_a^o, and $P_{c/a}^o$ are as defined in 1, 2, and 3 above.

5. *Labor Force Participation Rate*, L = CL/(NN-TL+CL) where,
   TL, CL = total and civilian labor force in 1000's,
      1933-69, *EE*, Table A-1,
   NN = total noninstitutional population 14 years of age and over before 1947 and 16 and over since 1947 in 1000's,
      1940-69, *EE*, Table A-1,
      1933-39, Total population and over times (.988), the ratio of the 1940 noninstitutional population 14 and over to the 1940 population 14 and over
         HS, Series A22, A27.

6. *Unemployment Rate*, U,
      1933-69, *EE*, Table A-1.

7. *Fraction of the Resident Population between 14 and 24*, A = NY/Nr where,
   NY = number of persons between 14 and 24 years of age in the resident population in 1000's,
      1933-39, *HS*, A28,
      1940-59, *CPR*, P-25, No. 98,310. No. 311 contains estimate for total population,
      1960-69, *CPR*, P-25, No. 519,
   NR = Resident Population in 1000's.
      1933-50, *HS*, Series A2,
      1951-60, *HSS*, Series A2,
      1961-69, *CPR*, P-25, No. 519.

SOURCES

1. *Current Population Reports*, (CPR) U.S. Bureau of the Census.
2. *Employment and Earnings*, (EE) U.S. Bureau of Labor Statistics.
3. *Economic Report of the President*, (ERP), 1970.
4. *Historical Statistics of the U.S.*, (HS), U.S. Bureau of the Census.
5. *Supplement to HS*, (HSS), U.S. Bureau of the Census, 1962.
6. *Judicial Criminal Statistics*, (JCS), U.S. Bureau of the Census.
7. *National Prisoner Statistics*, (NPS), U.S. Department of Justice; prior to 1950, U.S. Bureau of the Census.
8. *Statistical Abstract of the U.S.* (SA), U.S. Bureau of the Census.
9. *Survey of Current Business*, (SCB), U.S. Department of Commerce.
10. *Uniform Crime Report*, (UCR), U.S. Federal Bureau of Investigation.

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APPENDIX 3

PUBLICATIONS RELATING TO THE DETERRENT EFFICACY OF THE DEATH PENALTY PUBLISHED SINCE THE DATE OF FILING OF PETITIONER'S *FOWLER* REPLY BRIEF

A. Two additional empirical analyses of the deterrent efficacy of capital punishment have been published since the conclusion of the briefing in *Fowler v. North Carolina*, No. 73-7031:

1. William C. Bailey has addressed methodological criticisms of earlier deterrence studies by examining mean offense rates of first degree murder instead of all murder and non-negligent homicide, by controlling for etiological factors, and by considering execution rates as well as the legal authorization of capital punishment. His findings are "consistent with those of earlier investigations . . . but quite contrary to what deterrence theory would predict." Bailey, *Murder and Capital Punishment: Some Further Evidence*, 45 AM. J. ORTHOPSYCHIATRY 669, 685 (1975).

2. Peter Passell has performed a multiple regression analysis of homicide rates across states for the years 1950 and 1960, accounting for "as many of the major, quantifiable factors as possible that explain state-to-state variations in murder rates." The study finds "no reasonable way of interpreting the cross-section data that would lend support to the deterrence hypothesis." Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61, 79, 80 (1975).

B. The Isaac Ehrlich manuscript lodged with the Court by the Government in the *Fowler* case has been published in slightly modified form. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of*

Life and Death, 65 AM. ECON. REV. 397 (1975). Two criticisms of it and a response appear in Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L. J. 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L. J. 187 (1975); Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L. J. 209 (1975). We are informed by the editors of the Yale Law Journal that the January, 1976 issue will contain a further criticism by Professor Jon K. Peck, to which Professor Ehrlich will again respond.

APPENDIX 4

CAPITAL PUNISHMENT STATUTES ENACTED SINCE THE FILING OF PETITIONER'S *FOWLER* REPLY BRIEF

ALABAMA

Alabama provides the death penalty for some cases of "aggravated offenses." "Aggravated offenses are defined by Ala. H.B. 212 §2 (1975) as

"(a) Kidnapping for ransom or attempts thereof, when the victim is killed.

(b) Robbery or attempts thereof when the victim is killed.

(c) Rape when the victim is killed; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is killed.

(d) Nighttime burglary of an occupied dwelling when any of the occupants is killed.

(e) The unlawful intentional homicide of any police officer, sheriff, deputy, state trooper, or peace officer of any kind, or prison or jail guard, while such prison or jail guard is on duty, or because of some official or job-related act or performance of such officer or guard.

(f) Any unlawful intentional homicide committed while the Defendant is under sentence of life imprisonment.

(g) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration, or pursuant to a contract or for hire.

(h) Indecent molestation, or an attempt to indecently molest a child under the age of 16 years, when the child victim is killed.

(i) Wilful setting off or exploding dynamite or other explosive under circumstances now punishable by Title 14, Section 123 or 124, Code of Alabama 1940, when a person is killed because of said explosion.

(j) Murder in the first degree wherein two or more human beings are killed by one or a series of acts.

(k) Murder in the first degree where the victim is a public official or public figure, and the murder stems from or is caused by or related to his official position, acts, or capacity.

(l) Murder in the first degree committed while Defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft.

(m) Any unlawful homicide, except manslaughter in the second degree, committed by a Defendant who has been convicted of murder in the first or second degree in the twenty years preceding the crime.

(n) When perpetrated against any witness subpoened to testify at any preliminary hearing, trial grand jury proceeding against the defendent who kills or procures the killing of a witness, or when perpetrated against any human being while intending to kill such witness.

The punishment for "aggravated offenses is either death or life imprisonment. Ala. H.B. 212 §3 (1975).

The choice between these alternative penalties is made by a jury after a separate post-conviction sentencing hearing at which "evidence may be presented as to any matter that the court deems relevant to sentence, and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 6 and 7 of the Ace." Ala. H.B. 212 §3 (1975). However, "[n]otwithstanding the fixing of the punishment at death by the jury, the court after weighing the aggravating and mitigating circumstances may refuse to accept the death penalty as fixed by the jury and sentence the Defendant to life imprisonment without parole, which shall be served without parole; or the court after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the Defendant to death. If the court imposes a sentence of death, it shall set forth in writing as the basis for the sentence of death, findings of fact from the trial and the sentence hearing which shall at least include the following:

(a) One or more of the aggravating circumstances enumerated in Section 6, which it finds exists in the case and which it finds sufficient to support the sentence of death, and

(b) Any of the mitigating circumstances enumerated in Section 7 which it finds insufficient to outweigh the aggravating circumstances.

Ala. H.B. 212 §4 (1975).

The following "aggravating circumstances" are set forth in Ala. H.B. 212 §6 (1975):

"(a) The capital felony was committed by a person under sentence of imprisonment;

(b) The Defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(c) The Defendant knowingly created a great risk of death to many persons;

(d) The capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary, or kidnapping for ransom;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(h) The capital felony was especially heinous, atrocious or cruel."

The following "mitigating circumstances" are set forth in Ala. H.B. 212 §7 (1975):

"(a) The Defendant has no significant history of prior criminal activity;

(b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance;

(c) The victim was a participant in the Defendant's conduct or consented to the act;

(d) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The Defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the Defendant at the time of the crime."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Negotiated pleas to lesser offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on September 9, 1975.

MARYLAND

Maryland provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Md. Code Ann. Art. 27, §413 (1975 supp.) No new capital trial procedure is established. The penalty for first degree murder is life imprisonment unless "the defendant actually committed an act which proximately caused the victim's death" (Md. Code Ann. Art. 27, §413(b)(1) (1975 supp.)) and one of the circumstances enumerated in Md. Code Ann. Art. 27, §413(b)(3) (1975 supp.) is found to exist.

The following special circumstances are set forth in Md. Code Ann. Art. 27, §413(b)(3) (1975 supp.):

"(i) The defendant committed the murder at a time when he was confined or under sentence of confinement to any correctional institution in this State;

(ii) The defendant committed the murder in furtherance of an attempt to escape from or evade the lawful custody, arrest, or detention of or by a law-enforcement officer, correctional officer, or guard;

(iii) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or an attempt to kidnap;

(iv) The victim was a child abducted in violation of §2 of this article;

(v) The defendant committed the murder pursuant to an agreement or contract to commit the murder for pecuniary gain;

(vi) At the time of the murder, the defendant was under a sentence of life imprisonment;

(vii) The defendant committed more than one offense of murder in the first degree out of the same or separate incidents;

(viii) The defendant committed the murder while committing or attempting to commit robbery."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. While Md. Code Ann. Art. 27, §616(b) (1975) supp. provides that an indictment under Md. Code Art. 27, §413(b) (1975 supp.) may not be part of any other count or charge, convictions of lesser included offenses are not prohibited. Plea bargains to lesser included offenses are also not prohibited in capital cases; and the Governor's clemency power in capital cases is left unaltered.

The statute became effective on July 1, 1975.

MISSOURI

Missouri provides the death penalty for capital murder. Vernon's Mo. Stat. Ann. §559.009(3) (1976 supp.). "Capital" murder is defined as a killing where a defendant "unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of a human being." Vernon's Mo. Stat. Ann. §559.05 (1976 supp.)

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Negotiated pleas to lesser included offenses are not prohibited in capital cases, and convictions of lesser included offenses are specifically authorized by Vernon's Mo. Stat. Ann. §559.009(1) (1976 supp.). The Governor's clemency power in capital cases is left unaltered.

This statute became effective on June 23, 1975.

WASHINGTON

Washington provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Wash. Rev. Code 9.48.030 (1961); Initiative Measure No. 316 §2 (1975). No new capital trial procedure is established. The penalty for first degree murder is life imprisonment unless the crime was committed under or accompanied by one of the circumstances enumerated in Initiative Measure No. 316 §1.

The following special circumstances are set forth in Initiative Measure No. 316 §1 (1975):

"(1) The victim was a law enforcement officer or fire fighter and was performing his or her official duties at the time of the killing.

(2) At the time of the act resulting in the death, the defendant was serving a term of imprisonment in a state correctional institution.

(3) The defendant committed the murder pursuant to an agreement that he receive money or other thing of value for committing the murder.

(4) The defendant had solicited another to commit the murder and had paid or agreed to pay such person money or other thing of value for committing the murder.

(5) The defendant committed the murder with intent to conceal the commission of a crime, or to protect or conceal the identity of any person committing the same, or with intent to delay, hinder or obstruct the administration of justice by preventing any person from being a witness or producing evidence in any investigation or proceeding authorized by law or by influencing any person's official action as a juror.

(6) There was more than one victim and the said murders were part of a common scheme or plan, or the result of a single act of the defendants.

(7) The defendant committed the murder in the course of or in furtherance of the crime of rape or kidnapping or in immediate flight therefrom."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Conviction of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute will become effective on July 1, 1976.